

***Dubuque Packing*:¹ Employer Relocation Decisions and the Need for a Principled Approach to Determining What Is Subject to Mandatory Collective Bargaining**

I. INTRODUCTION

The recent National Labor Relations Board's (the Board's) decision in *Dubuque Packing Co.*,² "present[s] hard questions—indeed, some of the most polarizing questions in contemporary labor law."³ The decision exemplifies the uncertainty and confusion that encompasses relocation decisions in labor-management relations law. The result of *Dubuque Packing* is that the Board has now relied on four different approaches to determine whether or not management's decision to relocate is subject to mandatory collective bargaining.⁴ The administrative and judicial indecision in determining whether relocation decisions should be subject to mandatory collective bargaining is the result of continuing difficulties in interpreting the purposes of the National Labor Relations Act (NLRA)⁵ as well as applying Supreme Court precedent governing what types of decisions are subject to mandatory collective bargaining. Defining an approach to interpreting the NLRA is essential. Although the Board in *Dubuque Packing* fashioned a majority-supported approach for determining if management decisions to relocate should be subject to mandatory collective bargaining, the Board's approach is fundamentally inconsistent with the purposes of the NLRA as well as existing Supreme Court precedent.

Rather than providing insight and guidance for determining what is subject to mandatory collective bargaining, *Dubuque Packing* only further confounds the difficulties surrounding the issue. Instead of relying on the balancing test provided in *First National Maintenance Corp. v. NLRB*,⁶ the Board attempted

¹ *Dubuque Packing Co.* (Dubuque I), 287 N.L.R.B. 499 (1987), *remanded sub. nom.* *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), *rev'd*, *Dubuque Packing Co.* (Dubuque II), 303 N.L.R.B. no. 66, 1991 WL 146795 (1991).

² *Dubuque II*, 303 N.L.R.B. no. 66, 1991 WL 146795 (1991).

³ *Id.* at *1 (quoting *United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1439 (D.C. Cir. 1989)).

⁴ See *infra* notes 124–36, 201–15 and accompanying text.

⁵ National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended 29 U.S.C. §§ 141–69 (1988)).

⁶ See *infra* notes 90–100 and accompanying text.

to forge a new approach for addressing employer relocation decisions.⁷ Although many commentators have criticized the Supreme Court's decision in *First National Maintenance* as prompting an excursion by the judicial branch away from the stated purpose of the NLRA,⁸ this Comment will demonstrate that such criticism is misplaced. The balancing test set forth in *First National Maintenance* is not only consistent with the intentions and purposes of the NLRA, but is essential for determining what management decisions are subject to collective bargaining, including employer relocation decisions.⁹ The balancing test involves examining the benefits and the burdens of collective bargaining in light of the surrounding circumstances of a particular situation. Part II of this Comment explores the legislative history and language of the NLRA and the Labor Management Relations Act (LMRA). Part III examines the tenets of existing Supreme Court precedent addressing how to determine what employer decisions are subject to mandatory collective bargaining. Part IV examines decisions rendered by the Board and the courts before and after *First National Maintenance* in the area of employer relocation. Part V explores *Dubuque Packing* in depth. And finally, Part VI analyzes *Dubuque Packing* and develops a "comprehensive" balancing test based on the test set forth in *First National Maintenance*. The suggested approach will then be applied to *Dubuque Packing* to indicate how a decision should have been reached.

II. LEGISLATIVE BACKGROUND

During the turbulent times surrounding the labor sector of the market in the 1930's, Congress enacted the Wagner Act of 1935 (the NLRA) to combat the existing strife between labor and management.¹⁰ Congress intended the NLRA to promote the free flow of commerce and industrial peace by equalizing the bargaining power between labor and management.¹¹ The main purpose of the NLRA was to abolish the inequality between labor and management by providing employees with the right to form or join unions,

⁷ See *infra* part V.B.

⁸ See *infra* note 88.

⁹ See *infra* part III.B.

¹⁰ NLRA, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. §§ 151-69 (1988)).

For previous commentator discussions of the legislative history of the "Act" see James Friedman, *Keeping Big Issues Off the Table: The Supreme Court on Entrepreneurial Discretion and the Duty to Bargain*, 37 ME. L. REV. 223, 226-29 (1985); B. Glen George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 670-74 (1985); Thomas T. Crouch, Note, *The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace*, 41 VAND. L. REV. 577 (1988).

¹¹ See generally LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 29 U.S.C. § 151 (1988) [hereinafter NLRA LEGISLATIVE HISTORY].

engage in collective bargaining with management and use their economic weapons in a peaceful manner to gain concessions from management.¹² To insure that the employer bargained with the union, the NLRA made an employer's refusal to bargain with the union an unfair labor practice.¹³ Furthermore, the NLRA authorized the National Labor Relations Board to prohibit management's interference with the union's right to bargain. Congress, however, limited the Board's role to insuring that the parties followed the procedural aspects of the NLRA. The Board was not to interfere with the substantive terms of the contracts.¹⁴ Hence, the union, as representative of the employees, and management were to bargain over the substantive terms governing labor contracts while the Board made sure that the employer fulfilled its duty to bargain collectively and in good faith.¹⁵

While the employer had a duty to bargain with the union, nothing in the NLRA indicated the scope or extent of the employer's obligation to bargain with the union.¹⁶ In 1947, in order to circumscribe the vagueness surrounding the employer's duty to bargain in good faith, and to keep the Board from interfering with the substantive content of labor contracts, Congress sought to

¹² The essential rights of the employees are set forth in Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 157 (1988)), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 11, at 3273.

¹³ NLRA § 8(5), 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 158(a)(5) (1988)), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 11, at 3274.

¹⁴ NLRA § 8(d), 49 Stat. 449 (1935) (codified as amended 29 U.S.C. § 158(d) (1988)), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 11, at 2373. There is no language in the statute indicating that the Board may determine if the agreement between the parties is fair.

¹⁵ The NLRA does not provide for public regulation of the terms of the contracts. In fact, section 8(d) specifically prohibits the Board from requiring the parties to reach an agreement. According to Senator Walsh:

When employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.

79 Cong. Rec. 7660 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 11, at 2373.

¹⁶ *See supra* note 13.

better define the scope of the employer's duty to bargain¹⁷ by amending the NLRA with the Taft-Hartley Act (LMRA).¹⁸

The legislative history of the LMRA indicates that the House initially sought to require bargaining over five categories of management decisions.¹⁹ By the final draft of the Amendment, however, Congress defined collective bargaining as the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ." ²⁰ By keeping a high degree of flexibility in the language, Congress' modification of the NLRA maintained consistency with the original intent that labor and management would resolve their differences themselves through the collective bargaining procedures.²¹ The importance of

¹⁷ There was a great deal of concern in the House that the Board had overused its power by requiring employers to make specific concessions rather than merely enforcing the employers' duty to bargain. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 19-20 (1947), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 297-98 [hereinafter LMRA LEGISLATIVE HISTORY]. To permit the Board such latitude in addressing an employer's failure to bargain in "good faith" would be inconsistent with the purpose of the Act as set forth by Senator Walsh. *See supra* note 15; *see also* Friedman, *supra* note 10, at 227-28; *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

¹⁸ The Labor-Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 17, at 1-30 (codified as amended 29 U.S.C. §§ 141, 151-69 (1988)).

¹⁹ The House version of the bill required bargaining concerning:

- (i) wage rates, hours of employment, and work requirements; (ii) procedures and practices relating to discharge, suspension, lay-off, recall, seniority, and discipline, or to promotion, demotion, transfer and assignment within the bargaining unit; (iii) conditions, procedures, and practices governing safety, sanitation, and protection of health at the place of employment; (iv) vacations and leaves of absence; and (v) administrative and procedural provisions relating to the foregoing subjects.

H.R. 3020, 80th Cong., 1st Sess. section 2(11) (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 17, at 166-67.

²⁰ LMRA § 8(d), 61 Stat. 136 (1947) (codified as amended 29 U.S.C. § 158(d) (1988)), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 17, at 8.

²¹ The legislative history of the amendment demonstrates the importance Congress attached to keeping the bargaining process conducive to the promotion of free negotiation of contracts between the employer and the employees:

What are proper subject matters for collective bargaining should be left in the first instance to employers and trade-unions, and in the second place, to any administrative agency skilled in the field and competent to devote the necessary time to a study of

allowing the parties to freely bargain over the terms of their agreement is exemplified in the House minority report, which stated: "The appropriate scope of collective bargaining cannot be determined by a formula; it will inevitably depend upon the traditions of an industry, the social and political climate at any given time, the needs of employers and employees, and many related factors."²² True to its legislative intent, the NLRA provides no insight whatsoever into what decisions should be subject to collective bargaining and what decisions, if any, should not.

From this morass evolved an important distinction between "decision" bargaining and "effects" (impact) bargaining.²³ Decision bargaining involves the employer bargaining with the union concerning the prudence and wisdom of the employer's decision, as well as possible alternatives.²⁴ An employer has a duty to bargain over its decision if the decision involves "wages, hours, or other terms and conditions of employment."²⁵ Effects bargaining deals with the effects of an employer's decision on the well-being of the employees while the employer's decision is treated as final.²⁶ There is generally a broad per se duty requiring the employer to notify the union of its decision and bargain with the

industrial practices and traditions in each industry or area of the country, subject to review by the courts. It cannot and should not be strait-jacketed by legislative enactment.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 71 (1947) (minority report), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 17, at 362.

²² 1 LMRA LEGISLATIVE HISTORY, *supra* note 17, at 362.

²³ See *Brown Truck and Trailer Mfg. Co.*, 106 N.L.R.B. 999 (1953). In this case, the Board first made the distinction between "decision" and "effects" bargaining. The employer failed to bargain with the union concerning the employer's decision to close down a plant and transfer the work. The Board held that the employer did not have a duty to bargain over the decision to close down and move, but did have a duty to "advise the union of the contemplated move and to give the union the opportunity to bargain with respect to the contemplated move as it affected the employees" *Id.* at 1000.

²⁴ See PHILLIP A. MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION*, at 16-19 (1985); see also Thomas C. Kohler, *Distinctions Without Differences: Effects Bargaining in Light of First National Maintenance*, 5 INDUS. REL. L.J. 402, 413-18 (1983); Peter C. Schwarz, Note, *Section 8(d) of the NLRA and the Duty to Decision-Bargain Over Work Relocation: Some Observations on Management Rights After Milwaukee Spring II*, 36 SYRACUSE L. REV. 1055, 1058 n.29-31 (1985); W.R. Gradl, Comment, *Job Security, Managerial Prerogatives, and First National Maintenance*, 31 BUFFALO L. REV. 509, 509 n.3 (1982).

²⁵ MISCIMARRA, *supra* note 24, at 16-19; see also Kohler, *supra* note 24, at 413-18; *infra* notes 28-40 and accompanying text.

²⁶ See MISCIMARRA, *supra* note 24, at 16-19; see also Kohler, *supra* note 24, at 413-18..

union concerning the effects of the change on the employees even though an employer is not required to bargain with the union concerning its decision.²⁷

The openness of the language in the NLRA²⁸ led to vast amounts of Board and court activity in attempting to define which decisions are subject to the collective bargaining provisions of the Act and which are not. This intervention ultimately led to a delineation of "mandatory" and "permissive" subjects of collective bargaining.²⁹ In *NLRB v. Wooster Division of Borg-Warner Corp.*,³⁰ the Supreme Court read NLRA sections 8(a)(5) and 8(d) together to limit the duty of the employer to bargain in good faith to those subjects considered mandatory. As to "other matters," the parties were free to "bargain or not to bargain, agree or not to agree."³¹ Hence, while the parties must bargain in good faith over "mandatory" subjects until an impasse is reached, once an impasse is reached, neither side is required to make concessions and the employer is free to act unilaterally. Neither party, however, is required to bargain over "permissive" subjects, and an agreement may not be conditioned upon the acceptance of permissive terms.³² Another consequence of *Borg-Warner* was to permit the employer to unilaterally modify an item in an agreement without the consent of the union if the item was permissive. An employer, however, may not implement a unilateral change in an agreement if the term of the agreement is subject to mandatory collective bargaining.³³

Although the Court took the liberty of drawing the distinction between mandatory and permissive subjects of collective bargaining, nowhere in the opinion did the Court offer any type of methodology for determining what particular topics would be subject to mandatory collective bargaining and what

²⁷ *Brown Truck*, 106 N.L.R.B. at 1000; *Shamrock Dairy, Inc.*, 119 N.L.R.B. 998, 1006 (1957) (The employer has a general obligation to bargain which includes the duty to notify the union of the employees and afford the union the opportunity to bargain with respect to a "contemplated change concerning the tenure of the employees and their conditions of employment.").

²⁸ Hereinafter the NLRA and the LMRA are collectively referred to as "the Act."

²⁹ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1957). In *Borg-Warner*, the employer sought to include in the Agreement with the union a "recognition clause" and a "ballot clause." The recognition clause sought to exclude the International Union as a representative of the employees and recognize only the local affiliate. The ballot clause called for a pre-strike secret vote by union and non-union workers as to the employer's last offer. *Borg-Warner* eventually made acceptance of the entire Agreement a condition precedent upon the union accepting the two clauses. The Court summarily held that neither clause was subject to mandatory collective bargaining, and thus the company could not demand that the union bargain over the subjects. *Id.*

³⁰ *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1957).

³¹ *Id.* at 349.

³² *Id.* See, e.g., 29 U.S.C. § 158(d) (1988).

³³ *Borg-Warner Corp.*, 356 U.S. at 349; *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

topics would be permissive.³⁴ While this may have been done for any number of reasons,³⁵ it appears that the Court was simply articulating what seemed obvious from the language of the statute—those topics that involve “wages, hours, or terms and conditions of employment” are mandatory subjects of collective bargaining, while those topics that fall outside of the statutory definition are permissive.³⁶ Although Congress intended employers and unions to have a vast amount of flexibility in negotiating their contracts,³⁷ the LMRA was also intended to provide a more definite framework for determining the subject-matter falling under the realm of collective bargaining.³⁸ Thus, *Borg-Warner* was simply a judicial restatement of what Congressional action had already expressed.

Unfortunately, the result of the distinction drawn by the Court in *Borg-Warner* has led to one of the most controversial issues in labor law—what exactly is subject to mandatory collective bargaining?³⁹ The difficulty rests in the persistent attempts by the Board and the courts to develop a formula designed to determine what, exactly, is and is not a “term or condition of employment.”⁴⁰ Although the Board and the courts have managed to determine that a host of topics are subject to mandatory collective bargaining under NLRA section 8(d),⁴¹ a great deal of difficulty surrounds issues of economic

³⁴ The Court's lack of guidance in the decision has prompted a great deal of criticism from various commentators. See generally Archibald Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958); Friedman, *supra* note 10; William B. Gould IV, *The Burger Court and Labor Law: The Beat Goes On—Marcato*, 24 SAN DIEGO L. REV. 51 (1987); Note, *Major Operational Decisions and Free Collective Bargaining: Eliminating the Mandatory/Permissive Distinction*, 102 HARV. L. REV. 1971 (1989).

³⁵ Note, *supra* note 34, at 1977 n.30 (suggesting three reasons why the Court did not articulate a rationale for its decision: (i) Board's abuse of the good faith analysis; (ii) reducing the number of bargaining subjects would reduce the number of impasse bargaining situations; or (iii) without limits on the number of bargaining subjects, the stronger party would be too dominant).

³⁶ *Borg-Warner Corp.*, 356 U.S. at 348–49.

³⁷ See *supra* notes 19–22 and accompanying text.

³⁸ See *supra* notes 19–28 and accompanying text. But see Note, *supra* note 34 (criticizing Congress for even amending the NLRA with the Taft-Hartley Act).

³⁹ See LEE MODJESKA, NLRB PRACTICE, § 4.6, at 288 (1983 & Supp. 1991).

⁴⁰ *Dubuque II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *6–10 (1991).

⁴¹ Topics subject to mandatory collective bargaining include, *inter alia*: *Aeronca, Inc.*, 253 N.L.R.B. 261, *enforce. denied*, 650 F.2d 501 (4th Cir. 1981) (longstanding practice of giving Christmas gifts); *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979) (price of food in cafeterias); *J.P. Stevens & Co.*, 239 N.L.R.B. 738 (1978), *enforced*, 623 F.2d 322 (4th Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981) (employee safety); *Peerless Food Prods., Inc.*, 236 N.L.R.B. 161 (1978) (grievance and arbitration procedures); *Winn-Dixie Stores v. NLRB*, 567 F.2d 1343, 1347 (5th Cir.), *cert. denied*, 439 U.S. 985 (1978)

and entrepreneurial control such as employer relocations, plant closures and partial closures. Before examining the different tests and approaches proposed and used by the Board and the courts, this Comment examines the additional guidance offered by the Supreme Court in determining which employer decisions are subject to mandatory collective bargaining.

III. SUPREME COURT PRECEDENT

In addition to *Borg-Warner*, there are two Supreme Court cases of great significance addressing the subject of mandatory collective bargaining: *Fibreboard Paper Products Corp. v. NLRB*⁴² and *First National Maintenance Corp. v. NLRB*.⁴³ Together, these two cases represent the cornerstone for determining which employer decisions require bargaining.

(profit sharing plans); *Awrey Bakeries, Inc. v. NLRB*, 548 F.2d 138, 139 (6th Cir. 1976) (layoffs and recalls); *Dolly Madison Ind., Inc.*, 182 N.L.R.B. 1037 (1970) (most favored nation status); *American Smelting & Ref. Co. v. NLRB*, 406 F.2d 552, 554-55 (9th Cir.), *cert. denied*, 395 U.S. 935 (1969) (company housing); *NLRB v. Houston Chapter, Assoc. Gen. Contractors of Am., Inc.*, 349 F.2d 449, 451 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966) (company hiring practices); *The Little Rock Downtowner, Inc.*, 145 N.L.R.B. 1286 (1964), *enforced*, 341 F.2d 1020 (8th Cir. 1965) (workloads); *Industrial Union of Marine & Shipbuilding Workers of America v. NLRB*, 320 F.2d 615, 620 (3d Cir. 1963) (operations of employer's seniority program); *Richfield Oil Co. v. NLRB*, 231 F.2d 717, 724 (D.C. Cir. 1956) (stock purchase arrangements); *W. W. Cross & Co. v. NLRB*, 174 F.2d 875, 878 (1st Cir. 1949) (group insurance programs); *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949) (pension plans); *NLRB v. J. H. Allison & Co.*, 165 F.2d 766, 768-69 (6th Cir.), *cert. denied*, 335 U.S. 814 (1948) (merit wage increases); *Singer Mfg. Co. v. NLRB*, 119 F.2d 131, 136-37 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941) (bonuses). Compare permissive topics which include, *inter alia*: *Covington Furniture Mfg. Corp.*, 212 N.L.R.B. 214, *enforced*, 514 F.2d 995 (6th Cir. 1975) (indemnity clause); *NLRB v. Bricklayers & Mason Int'l Union*, 405 F.2d 469, 471 (9th Cir. 1968) (fees and dues guaranty clause); *Phillip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 331 F.2d 720, 725-26 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964) (superseniority for nonstrikers and strike replacements); *Douds v. Int'l Longshoremen's Ass'n*, 241 F.2d 278, 282 (2d Cir. 1957) (scope of the bargaining unit); and *NLRB v. Retail Clerks Int'l Ass'n*, 203 F.2d 165, 170 (9th Cir. 1953), *cert. denied*, 348 U.S. 839 (1954) (inclusion of supervisors in the bargaining unit). See MODJESKA, *supra* note 39, at 299-305; see also Timothy J. Heinsz, *The Partial Closing Conundrum: The Duty of Employers and Unions to Bargain in Good Faith*, 1981 DUKE L.J. 71, 72-73 (1981); Edward P. O'Keefe & Seamus M. Tuohey, *Economically Motivated Relocations of Work and an Employer's Duty Under Section 8(d) of the National Labor Relations Act: A Three-Step Analysis*, 11 FORDHAM URB. L.J. 795, 801-03 (1983).

⁴² 379 U.S. 203 (1964).

⁴³ *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

A. Fibreboard Paper

In *Fibreboard*, the Court addressed the issue of whether an employer's decision to "contract out" its plant maintenance operations due to high labor costs required bargaining with the union.⁴⁴ After conducting a study, the company concluded that it could save money if it engaged an independent contractor to perform the necessary maintenance at the plant.⁴⁵ The company then informed the union of the results of the study and of its decision to subcontract the maintenance services. The company further informed the union that negotiations in light of their study would be pointless.⁴⁶ After failed attempts by the union to discuss the situation with management, subcontractors replaced the unit workers.⁴⁷

The union then proceeded to file unfair labor practice charges against the company pursuant to sections 8(a)(1), (3) and (5) of the Act. The trial examiner recommended that the complaint be dismissed and the Board agreed.⁴⁸ After a change in Board membership, however, the Board granted the requests for reconsideration of the complaint.⁴⁹ Upon reconsideration, the Board held that even though the company had based its decision to contract out the maintenance work on economic factors rather than anti-union animus, the failure of the company to bargain with the union was a breach of its duty to bargain in good faith.⁵⁰ The Court of Appeals for the District of Columbia enforced the Board's decision⁵¹ and the Supreme Court affirmed.⁵²

The Court set forth two reasons why the employer breached its duty to bargain over its decision to contract out and why the decision to contract out should be subject to mandatory collective bargaining. First, the Court stated that its holding was consistent with the language and the purposes of the Act. According to the Court, the contracting out of labor was "well within the literal meaning of the phrase 'terms and conditions of employment.'"⁵³ However, it has been noted that the Court's premise is merely a statement without support in the legislative history of the Act.⁵⁴

⁴⁴ *Fibreboard Paper Prods. Corp.*, 379 U.S. at 205-06.

⁴⁵ *Id.* at 206.

⁴⁶ *Id.*

⁴⁷ *Id.* at 207.

⁴⁸ *Fibreboard Paper Prods. Corp.*, 130 N.L.R.B. 1558, 1558 (1961).

⁴⁹ *Fibreboard Paper Prods. Corp.*, 138 N.L.R.B. 550, 550 (1962), *enforced*, 322 F.2d 411 (D.C. Cir. 1963), *aff'd*, 379 U.S. 203 (1964).

⁵⁰ *Id.* at 551 (relying on *Town & Country Mfg. Co.*, 136 N.L.R.B. 1022 (1962)).

⁵¹ *Fibreboard Paper Prods. Corp. v. NLRB*, 322 F.2d 411 (D.C. Cir. 1963).

⁵² *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964).

⁵³ *Id.* at 210.

⁵⁴ See Friedman, *supra* note 10, at 248-49 (criticizing the decision as unrealistic based on the Act).

Second, the Court looked at existing industrial practices regarding bargaining over decisions to subcontract. The Court determined that provisions regarding contracting out work existed in "numerous" agreements and were the subject of numerous grievances as well.⁵⁵ Based on these two observations, the Court found that the employer's failure to bargain with the union concerning its decision to subcontract was an unfair labor practice in violation of the Act.

The Court further indicated that the primary purpose of the Act was to "promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."⁵⁶ The Court concluded that the issue of contracting out was of such "vital concern" that it was appropriately placed within the bargaining framework so that labor and management could resolve the issue in pursuit of industrial peace.⁵⁷

The Court went on to examine how the employer's decision in this case did not alter the company's basic operations, but rather turned entirely upon labor costs.⁵⁸ The Court contrasted the decision to subcontract work based on labor costs with a decision to subcontract based on capital investment plans. The Court suggested that had the decision to contract out centered upon capital investments or improvements, the company may not have had a duty to bargain with the union.⁵⁹ The Court's comparison of the labor costs against the extent of capital investment provided the springboard for the balancing test the Court later used in *First National Maintenance*.⁶⁰

The Court in *Fibreboard* also specifically limited its holding. When the employer replaces employees in the existing bargaining unit with an independent contractor to do the same work under similar conditions of employment, the employer must bargain with the union. The decision did not address all situations of contracting out and/or subcontracting.⁶¹ While the Court has sometimes been criticized for failing to set forth some sort of limiting criteria for determination of what is subject to mandatory collective bargaining,⁶² it is apparent that the Court did follow the legislative history of the Act by not prescribing a set formula for determining what is and is not

⁵⁵ *Fibreboard Paper Prods. Corp.*, 379 U.S. at 211-12.

⁵⁶ *Id.* at 211 n.4 (relying on the declaration of policy set forth in sections 1 and 101 of the LMRA (29 U. S. C. §§ 141 & 151 (1988))).

⁵⁷ *Fibreboard Paper Prods. Corp.*, 379 U.S. at 211.

⁵⁸ *Id.* at 213.

⁵⁹ *Id.*

⁶⁰ *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

⁶¹ *Fibreboard Paper Prods. Corp.*, 379 U.S. at 215.

⁶² See generally Friedman, *supra* note 10; George, *supra* note 10; Heinsz, *supra* note 41; Crouch, *supra* note 10, at 577; Note, *Eliminating the Mandatory/Permissive Distinction*, *supra* note 34; John B. McArthur, Note, *Enforcing the NLRA: The Need for a Duty to Bargain Over Partial Plant Closings*, 60 TEX. L. REV. 279 (1982).

subject to collective bargaining.⁶³ Rather, by limiting its decision to the case before it, the Court left the door to negotiations open so that labor and management could explore and discuss the variety of issues certain to arise in the future.

Probably the most significant aspect of the case was Justice Stewart's concurring opinion, in which he set forth three categories of management decisions.⁶⁴ Justice Stewart expressed the fear that the language of the Court's opinion was much too broad and would be applied beyond the facts of the case.⁶⁵ To demonstrate the appropriate limitations of *Fibreboard*, Stewart delineated three categories of management decisions. First, there are management decisions [Type I] that clearly fall within the language "terms and conditions of employment."⁶⁶ Such decisions include what one's hours are to be, the amount of work expected, safety procedures, questions of employee discharge, and work assignment.⁶⁷ The second category of decisions [Type II] involve decisions that "lie at the core of entrepreneurial control" and cannot be mandatory subjects of collective bargaining despite their effect on job security.⁶⁸ Decisions falling into this category include advertising expenditures, product design, manner of financing, and sales strategy. While these types of decisions have an impact on an employee's job security and employment, management need not bargain over such decisions because the impact is too attenuated and indirect.⁶⁹ The third category of management decisions [Type III] involves decisions that are "not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment."⁷⁰ According to Stewart, nothing in the Court's holding should be read to imply a mandatory duty to bargain over Type III decisions.⁷¹ Stewart's categorization and discussion of the need to limit the expansiveness of the "terms and conditions" language, and the entire *Fibreboard* opinion, would prove to be the nucleus of the *First National Maintenance* decision.

⁶³ See *supra* note 36.

⁶⁴ *Fibreboard Paper Prods. Corp.*, 379 U.S. at 223-25 (Stewart J., concurring).

⁶⁵ *Id.* at 218, 221.

⁶⁶ *Id.* at 224.

⁶⁷ *Id.* at 222.

⁶⁸ *Id.* at 223.

⁶⁹ *Id.*

⁷⁰ *Id.* These three categories were later articulated in *First National Maintenance* and the Supreme Court created a balancing test to resolve determinations under category three. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981).

⁷¹ *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 225 (1964).

B. First National Maintenance

In *First National Maintenance*, the Court addressed the issue of whether an employer had a duty to bargain with the union over its decision to partially terminate a portion of its operations for economic reasons.⁷² First National Maintenance provided cleaning and maintenance services to Greenpark Care Center, a nursing home.⁷³ Greenpark provided the equipment, supplies and materials, reimbursement of labor fees and a set management fee in exchange for the maintenance services.⁷⁴ Overall, the relationship between First National Maintenance and Greenpark was not very "remunerative or smooth."⁷⁵ In March of 1987, Greenpark provided First National Maintenance with a 30-day notice of cancellation of their contract due to inefficient services.⁷⁶ First National Maintenance, however, continued to provide services to Greenpark until July 6, when, upon realizing that it was losing money on the contract, First National Maintenance informed Greenpark that without an adjustment in the contract, First National Maintenance would cease operations.⁷⁷

While First National Maintenance was encountering its difficulties with Greenpark, the First National Maintenance employees elected union representation, and on July 12, the union notified First National Maintenance that it wanted to bargain.⁷⁸ However, on July 28, First National Maintenance informed the employees that they would be discharged in three days.⁷⁹ The union attempted to negotiate with First National Maintenance, but the company claimed the decision centered upon economics and was final.⁸⁰ The union filed unfair labor practice charges against First National Maintenance pursuant to sections 8(a)(1) and (5) of the Act.⁸¹

The Administrative Law Judge (ALJ) found in favor of the union, stating that First National Maintenance failed to bargain over its decision to terminate the employees as well as the effects of the termination.⁸² The ALJ reasoned that because the employees would lose their jobs, their termination resulted in a change of "conditions" under the Act. Furthermore, the ALJ stated that bargaining over the decision to terminate employment would have provided the

⁷² *First Nat'l Maintenance Corp.*, 452 U.S. at 667.

⁷³ *Id.* at 668.

⁷⁴ *Id.*

⁷⁵ *Id.* at 669.

⁷⁶ *Id.*

⁷⁷ *Id.* Rather than the \$500 fee agreed upon in the original contract, Greenpark apparently only paid First National Maintenance \$250. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 669-70.

⁸¹ *Id.* at 670.

⁸² *Id.*

union with the opportunity to offer alternatives to the unit's termination.⁸³ Thus, the ALJ's conclusion was that all decisions to terminate employment were subject to mandatory collective bargaining—per se. The Board adopted the ALJ's holding without analysis, and the United States Court of Appeals for the Second Circuit enforced the Board's order, using a somewhat different analysis.⁸⁴

The Second Circuit stated that section 8(d) of the Act created a "rebuttable presumption" in favor of mandatory bargaining over decisions to terminate employment.⁸⁵ The court suggested that the presumption could be rebutted in one of three ways. First, the employer could seek to demonstrate that bargaining over the decision would be futile. Second, the employer could argue that the decision was the result of an emergency financial situation. Third, the employer could seek to show that bargaining over the decision was not a customary practice of the industry.⁸⁶ The United States Supreme Court granted certiorari⁸⁷ and, in a heavily criticized opinion,⁸⁸ reversed the Second Circuit

⁸³ *Id.* at 670–71.

⁸⁴ *Id.* at 671–72.

⁸⁵ *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 601–02 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981).

⁸⁶ *First Nat'l Maintenance Corp.*, 627 F.2d at 601–02.

⁸⁷ *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The courts and the Board applied several different tests in determining near identical issues as the ones before the Court. While some of the Courts of Appeals accepted the rebuttable presumption test set forth by the Second Circuit, others applied the "per se" approach adopted by the Board in this case. Still other courts followed the test set forth in *Fibreboard* not requiring bargaining if the decision involved a major capital investment, or a change in the basic operations of the business. The Board was apparently all over the place in terms of applying different tests. *Id.* at 672–73 nn.7–10.

⁸⁸ Stanley A. Gacek, *The Employer's Duty to Bargain on Termination of Unit Work*, 32 LAB. L.J. 699, 710–16 (1981); George, *supra* note 10, at 678–80; Michael C. Harper, *Leveling the Road From Borg Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 VA. L. REV. 1447, 1449–62 (1982); Kohler, *supra* note 24; Mary Aronov, Comment, *Labor Law—The Employer's Duty to Bargain Over a Decision to Close Part of its Business*, 12 MEM. ST. U.L. REV. 185 (1981); Gradl, *supra* note 24; Shelley Hoffman, Note, *Employer's Duty To Bargain With Respect to Partial Termination of Business: First National Maintenance Corp. v. NLRB*, 36 SW. L.J. 793, 801–05 (1982); McArthur, *supra* note 62; Andrew Seiden, Comment, *Labor Law: An Employer's Duty to Bargain Concerning the Decision to Terminate Part of a Business*, 34 U. FLA. L. REV. 292 (1982); Susan M. Solomon, Note, *Collective Bargaining Over Plant Relocation Decisions: Let's Make A Deal*, 18 NEW ENG. L. REV. 715, 732–39 (1983); Note, *The Supreme Court, 1980 Term, Labor—Scope of Mandatory Bargaining Under the NLRA*, 95 HARV. L. REV. 91, 329, 329–38 (1981); William R. Whitehurst, Note, *Labor Law—A Balancing of Interests Test Applied to the Duty to Bargain About a Partial Closing Decision: First National Maintenance Corp. v. NLRB*, 61 N.C.L. REV. 365 (1983).

and the Board by holding that the employer had no duty under section 8(d) to bargain over its decision to terminate the contract.⁸⁹

The Court first examined the purposes and the language of the Act. Again, the Court drew from the language that only "wages, hours, and other terms and conditions of employment" were subject to mandatory collective bargaining.⁹⁰ The Court then adopted Justice Stewart's three types of management decisions in *Fibreboard* as the *initial step* in determining whether the decision fell under section 8(d).⁹¹ A problem arises only when a decision is a Type III decision.

The Court reasoned that decisions produced through the collective bargaining process only result in the anticipated industrial peace and improved labor-management relations if the "subject proposed for discussion is amenable to resolution through the bargaining process."⁹² However, determining what subjects were not "amenable to resolution through the collective bargaining process" involved a complex consideration of both the employer's and the employees' interests.⁹³ In order to balance these respective interests, the Court set forth a balancing test that mandated bargaining over Type III decisions if the benefit to labor-management relations and the collective bargaining process outweighs the burden placed on the conduct of business.⁹⁴

The Court stated that the employer's need for "unencumbered decisionmaking" necessitated the balancing test.⁹⁵ In applying the balancing test, the Court examined labor's interests, citing job security and the need for fair dealing on behalf of the employer as vital.⁹⁶ The Court also noted that labor's needs were adequately protected by the Act and effects bargaining.⁹⁷ The Court further stated that if labor costs were an important factor, the employer would clearly have an incentive to bargain with the union.⁹⁸ On the employer's side of the scales, the Court recognized management's need for speed, flexibility, secrecy, and profitability as burdens that may not, in light of the circumstances, require bargaining over Type III decisions.⁹⁹ Thus, once an adjudicatory body determines that the employer's decision is a Type III decision, it must apply the balancing test to the facts of the situation to determine whether the decision is amenable to the bargaining process. If the

⁸⁹ *First Nat'l Maintenance Corp.*, 452 U.S. at 686.

⁹⁰ *Id.* at 674-75. See also *supra* notes 64-69 and accompanying text.

⁹¹ *Id.* at 676-77 (quoting Stewart, J.).

⁹² *Id.* at 678.

⁹³ *Id.* at 678-79.

⁹⁴ *Id.* at 679.

⁹⁵ *Id.*

⁹⁶ *Id.* at 681-82.

⁹⁷ *Id.*

⁹⁸ *Id.* at 682.

⁹⁹ *Id.* at 679, 682-83.

decision is amenable to the bargaining process, then bargaining will be mandated. The Court noted that it implicitly applied the balancing test in *Fibreboard*.¹⁰⁰

With the balancing test in place, the Court next determined whether partial closing decisions were subject to mandatory collective bargaining. The Court concluded that the harm likely to be done to the company by mandating bargaining concerning a decision based wholly on economic factors (i.e., loss of a customer) outweighed any possible benefit attainable through the bargaining process.¹⁰¹

In expressing the limits of its holding, the Court stated that it in no way intimated a view as to other types of management decisions.¹⁰² Furthermore, the Court limited the case to its facts, stressing that in this case the decision to terminate part of its operations turned on economic factors involving the size of a management fee, over which the union had absolutely no control.¹⁰³ Also, the Court indicated that the employer had no intention of replacing the discharged employees.¹⁰⁴

With *Fibreboard* and *First National Maintenance* etched out, it is clear that in determining what exactly are "terms and conditions of employment," the Court anticipated and advocated that a balancing of the respective interests of the parties would produce equitable results. The Board, however, has not readily followed the Court's direction.

IV. RELOCATION DECISIONS

A. *Decisions Before and Immediately After First National Maintenance*

The decisions before and after *First National Maintenance* reflect the inability of the Board and the courts to develop and utilize a systematic

¹⁰⁰ *Id.* at 679.

¹⁰¹ *Id.* at 686.

¹⁰² *Id.* at 686 n.22. Footnote 22 states in part:

In this opinion we of course intimate no view as to other types of management decisions, such as *plant relocations*, sales, other kinds of subcontracting, automation, etc., which are to be considered on their particular facts. *See, e.g., International Ladies' Garment Workers Union v. NLRB*, 150 U.S. App. D.C. 71, 463 F.2d 907 (1972) (plant relocation predominantly due to labor costs); *Weltronic Co. v. NLRB*, 419 F.2d 1120 (6th Cir. 1969), *cert denied*, 398 U.S. 938 (1970) (decision to move plant three miles)

Id. (emphasis added).

¹⁰³ *Id.* at 687.

¹⁰⁴ *Id.*

approach to addressing relocation decisions. Prior to the advent of *First National Maintenance*, the Board consistently applied a per se approach to employer relocations, holding that all employer decisions to relocate workers, equipment or operations were subject to mandatory collective bargaining.¹⁰⁵ The Board went so far in *American Needle & Novelty Co.*¹⁰⁶ to declare that "[i]t is well settled that an employer has an obligation to bargain concerning a decision to relocate unit work."¹⁰⁷

The Board continued to apply its per se approach to employer relocations even after *First National Maintenance*. The Board relied on the limiting language of *First National Maintenance* as indicating the holding of the case was inapplicable to employer relocation decisions.¹⁰⁸ In *Tocco Division of Park-Ohio Industries, Inc.*,¹⁰⁹ the Board's first relocation decision after *First National Maintenance*, the Board maintained its position that "[i]t is well settled that an employer has an obligation to bargain concerning a decision to relocate unit work."¹¹⁰ The Board failed to even acknowledge *First National Maintenance* and its possible application.¹¹¹ When the Board did recognize the

¹⁰⁵ See, e.g., *Otis Elevator (Otis I)*, 255 N.L.R.B. 235 (1981), *rev'd*, 269 N.L.R.B. 891 (1984); *Whitehall Packing Co.*, 257 N.L.R.B. 193 (1981); *Coated Products, Inc.*, 237 N.L.R.B. 159 (1978), *enforced*, 620 F.2d 289 (3d Cir. 1980); *P.B. Mutrie Motor Transp., Inc.*, 226 N.L.R.B. 1325 (1976); *Stone and Thomas*, 221 N.L.R.B. 573 (1975); *Burroughs Corp.*, 214 N.L.R.B. 571 (1974); *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973); *R.L. Sweet Lumber Co.*, 207 N.L.R.B. 529 (1973), *enforced*, 515 F.2d 785 (10th Cir.), *cert. denied*, 423 U.S. 986 (1975); *Regal Aluminum, Inc.*, 190 N.L.R.B. 468 (1971); *McLoughlin Mfg. Corp.*, 182 N.L.R.B. 958 (1970), *enforced as modified sub nom. International Ladies' Garment Workers' Union v. NLRB*, 463 F.2d 907 (D.C. Cir. 1972); *Plymouth Indus., Inc.*, 177 N.L.R.B. 607 (1969), *enforced*, 435 F.2d 558 (6th Cir. 1970); *Weltronic Co.*, 173 N.L.R.B. 235 (1968), *enforced*, 419 F.2d 1120 (6th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); *Standard Handkerchief Co.*, 151 N.L.R.B. 15 (1965). For detailed discussions of the development of the Board's approach to relocation decisions prior to *First National Maintenance*, see George, *supra* note 10, at 681-86; O'Keefe & Tuohey, *supra* note 41, at 815-19.

¹⁰⁶ 206 N.L.R.B. 534 (1973) (transferring work from one facility to another facility within a multiplant operation).

¹⁰⁷ *Id.* at 534 (citing *Weltronic Co.*, 173 N.L.R.B. 235 (1968)).

¹⁰⁸ Specifically, the Board relied on footnote 22, see *supra* note 102.

¹⁰⁹ 257 N.L.R.B. 413 (1981), *enforced*, 702 F.2d 624 (6th Cir. 1983) (An employer relocated its operations from Cleveland, Ohio to Boaz, Alabama in order to reduce production costs. However, it was unclear whether the lower costs would be the result of lower wages, cheaper raw materials, lower energy costs or some other decreased cost.).

¹¹⁰ *Id.* at 413 (citing *American Needle & Novelty Co.*, 206 N.L.R.B. 534 (1973)).

¹¹¹ *Whitehall Packing Co.*, 257 N.L.R.B. 193 (1981) (The Board, adopting the ALJ's opinion, held that the employer failed to bargain in good faith over its decision to relocate work to an "alter ego" company. The case may be distinguishable, however, because of the employer's apparent anti-union animus as opposed to a change in the nature of the

potential application of *First National Maintenance*, the Board's acknowledgement amounted to little more than distinguishing *First National Maintenance* from the case before it.¹¹²

Perhaps the only area of consistency in employer relocations is when an employer relocates because of anti-union animus. Where direct evidence exists that the employer relocated to avoid bargaining with a union, such a relocation is considered a "runaway shop" and will result in a prima facie unfair labor practice.¹¹³ The line of reasoning addressing "runaway" shops was upheld in *First National Maintenance*.¹¹⁴ This rule is of course consistent with the Act and is a per se rule.¹¹⁵

B. Otis Elevator I & II

The Board reiterated its per se approach to employer relocations in *Otis Elevator Co. (Otis I)*.¹¹⁶ In *Otis I*, United Technologies (United) acquired the Otis Elevator Company. United decided to consolidate research and development facilities by transferring the Otis Elevator research and development units located in Parsippany and Mahwah, New Jersey to a new facility in East Hartford, Connecticut.¹¹⁷ United transferred the non-union work unit in Parsippany to East Hartford, then proceeded to transfer seventeen

employer's business.); see also *Ford Bros., Inc.*, 263 N.L.R.B. 92 (1982) (similar to *Whitehall Packing*).

¹¹² See *Carbonex Coal Co.*, 262 N.L.R.B. 1306 (1982). The employer failed to bargain over a decision to relocate the work unit. Again, however, anti-union animus was present. The Board distinguished the case from *First National Maintenance*. *Id.* at 1307 n.2.

¹¹³ See, e.g., *Strawsine Mfg. Co.*, 280 N.L.R.B. 553 (1986) (although suffering from financial difficulties, the Board determined that the employer relocation was motivated by anti-union animus and was therefore an unfair labor practice); *Ethyl Corp.*, 231 N.L.R.B. 431 (1977) (closure of even part of an employer's operations because of anti-union animus resulted in a runaway shop and therefore unfair labor practices); *Garwin Corp.*, 153 N.L.R.B. 664 (1965), *enforced in part sub nom. International Ladies' Garment Workers' Union v. NLRB*, 374 F.2d 295 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 942 (1967) (employer closed plant in New York and relocated to Florida in order to avoid the "union clutches"); see also *C.J.R. Transfer, Inc.*, 300 N.L.R.B. no. 148 (1990), 1990 WL 173741, *enforced*, 936 F.2d 279 (6th Cir. 1991); *Lear Siegler, Inc.*, 295 N.L.R.B. 857 (1989); *Arrow Automotive Indus. Inc.*, 284 N.L.R.B. 487 (1987), *enforcement denied*, 853 F.2d 223 (4th Cir. 1988); *Dahl Fish Co.*, 279 N.L.R.B. 1084 (1986), *enforced*, 813 F.2d 1254 (D.C. Cir. 1987); *Safelite, Div. of Lear Siegler, Inc.*, 277 N.L.R.B. 782 (1985); *Pay 'N Save Corp.*, 210 N.L.R.B. 311 (1974); *Helrose Bindery, Inc.*, 204 N.L.R.B. 499 (1973).

¹¹⁴ *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

¹¹⁵ See *supra* part II.

¹¹⁶ 255 N.L.R.B. 235 (1981), *rev'd*, 269 N.L.R.B. 891 (1984). For a detailed discussion of the *Otis I* and *II* decisions, see George, *supra* note 10, at 686-95.

¹¹⁷ *Otis I*, 255 N.L.R.B. at 235-36.

work unit employees from the unionized Mahwah facilities to East Hartford, refusing to bargain with the union over its decision to relocate the employees.¹¹⁸ United cited a desire to have the elevator research and development facilities closer to its research headquarters, duplication of tasks, and outdated facilities at Mahwah as reasons for the relocation.¹¹⁹ The union argued that United had a duty to bargain over the decision to transfer the employees to the new facilities.¹²⁰

The Board, upholding and essentially adopting the ALJ's opinion, stated that United's "reorganization" did not involve a relatively large capital investment and did not appear to change the nature, scope, or direction of the business.¹²¹ Relying heavily on *Fibreboard*, the Board held that United violated its duty to bargain with the union in good faith over its decision to relocate the facilities and workers and therefore committed an unfair labor practice.

While the case was before the Court of Appeals for the District of Columbia, the Supreme Court rendered *First National Maintenance*.¹²² Upon the rendering of *First National Maintenance*, the Board requested that the Court of Appeals remand the case for reconsideration in light of *First National Maintenance*.¹²³ The Board then reversed itself in *Otis Elevator Co. (Otis II)*.¹²⁴ Although the Board sought to have *Otis I* remanded for reconsideration in light of *First National Maintenance*, only one of the three opinions produced in *Otis II* purported to actually use the *First National Maintenance* balancing test. The result of the *Otis II* opinions was simply to muddy murky waters.

The plurality opinion, penned by Members Dotson and Hunter, proposed an analysis based essentially on the motivation of the employer's decision to relocate. The plurality held that the "essence of the decision" was the determining factor in concluding whether the decision at issue is subject to mandatory collective bargaining.¹²⁵ If the essence of the decision to relocate

¹¹⁸ *Id.* at 236, 242 (United transferred 17 of the 350 employees from Mahwah facilities and approximately 30 from the Parsippany facilities to East Hartford.).

¹¹⁹ *Id.* at 235-36.

¹²⁰ *Id.* at 242-43.

¹²¹ *Id.* at 236. The Board noted that only a total of 43-53 persons were transferred and of those, only 17 were represented by the union. Furthermore, while the cost of the facilities was \$2-3.5 million, this was a relatively insignificant capital investment in light of United's \$2 billion international operation. Therefore, the Board concluded that there was no significant capital investment, nor was there a shift in the nature of the business practice as the Court in *Fibreboard* indicated would permit the employer to freely exercise its decisionmaking power without bargaining with the union. *Id.*

¹²² Also, while the appeal was pending, President Reagan appointed to the Board three new members (Chairman Dotson and Members Dennis and Hunter).

¹²³ *Otis Elevator Co. (Otis II)*, 269 N.L.R.B. 891, 891 (1984).

¹²⁴ *Id.*

¹²⁵ *Id.* at 892.

resulted in a change in the nature, scope, or direction of the business, then the decision would not be subject to mandatory collective bargaining. If the decision turned upon labor costs, however, then the decision would be subject to mandatory collective bargaining.¹²⁶ The opinion went so far as to imply that bargaining would only be mandatory if labor costs were the "sole" consideration.¹²⁷ Thus, rather than actually applying the *First National Maintenance* balancing test, the plurality merely acknowledged *First National Maintenance* and then went on to use a comparison analysis to hold that United did not have to bargain with the union concerning its relocation decision.

The plurality chose to "rely" on *First National Maintenance* despite its limiting language and the fact that it explicitly stated it did not apply to relocation decisions.¹²⁸ The Board reasoned that although the Court excluded relocation decisions from its analysis, it was necessary to examine relocation decisions in light of Justice Stewart's *Fibreboard* analysis. The Board concluded that the underlying premise of *Fibreboard* and *First National Maintenance* was that management should not be required to bargain over decisions involving a change in the nature or scope of the business.¹²⁹

In a concurring opinion, Member Dennis purporting to use *First National Maintenance*, applied a diluted version of the balancing test. Under Dennis' approach, the first determination is whether the decision is amenable to the collective bargaining process.¹³⁰ The key factor in determining whether a decision is amenable to the collective bargaining process turns on the union's ability to offer the employer "significant consideration" such as concessions that would make a difference in the employer's decision.¹³¹ If the decision is deemed not amenable to the bargaining process, the analysis would end and the decision would not be subject to mandatory bargaining.

If the employer's decision is amenable to the collective bargaining process, however, then the second step of Dennis' approach would apply. The second step requires application of the *First National Maintenance* balancing test.¹³² Upon applying the balancing test, if the benefits to the collective bargaining

¹²⁶ *Id.* at 891-92.

¹²⁷ *Id.* at 894. A plurality of the Board, relying on the reasoning in *First National Maintenance*, stated: "[I]f labor costs were a factor, that element of the decision could be adequately dealt with in effects bargaining." *Id.* (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981)).

¹²⁸ *Oris II*, 269 N.L.R.B. at 893.

¹²⁹ *Id.* The Board stated that the needs of management expounded in *First National Maintenance* (predictability, flexibility, speed, secrecy, and profitability) operated to exclude from mandatory collective bargaining *all* decisions involving a change in the scope or direction of a business. *Id.* at 893 (emphasis added).

¹³⁰ *Id.* at 897 (Member Dennis, concurring).

¹³¹ *Id.*

¹³² *Id.*

process and labor-management relations outweigh the burdens imposed upon management and its conduct of business, then bargaining with the union over the decision is mandatory. Otherwise, management is free to act without bargaining with the union.¹³³ In the present case, Dennis claimed that the decision itself was not amenable to the collective bargaining process, and therefore did not apply the balancing test.¹³⁴

The third approach in *Otis II* was Member Zimmerman's "amenability to the collective bargaining process" standard.¹³⁵ If, upon looking at the decision, it appeared the decision was amenable to the collective bargaining process, then the employer had to bargain with the union concerning the decision. If the decision was not amenable, the employer was not required to bargain over the decision. Zimmerman held that United's decision was not amenable to the bargaining process and therefore United was not required to bargain with the union.¹³⁶

The result of *Otis II* on relocation decisions was a hodge-podge of inconsistent reasoning that failed to latch onto one of the opinions set forth in *Otis II*.¹³⁷ The opinions following *Otis II* relied sometimes on the plurality's "turns on labor cost" approach;¹³⁸ but often the Board simply used an "under

¹³³ *Id.* Member Dennis, relying on *First National Maintenance*, cited as factors to be examined in determining the extent of the burden imposed upon management as: extent of capital commitment, extent of changes in operations, need for speed, need for flexibility and need for confidentiality. Dennis also suggested that the list was not exclusive. *Id.*

¹³⁴ *Id.* at 899 (Member Dennis, concurring). According to Dennis, the focus of United's decision to relocate was based on profitability of the company. Furthermore, Dennis stated that the factors prompting United's decision were beyond the control of the union and therefore bargaining would not be worthwhile. These factors included: antedated technology, noncompetitive product designs, and duplication of efforts. *Id.*

¹³⁵ *Id.* at 900-01 (Member Zimmerman, concurring in part).

¹³⁶ *Id.* Member Zimmerman reached his conclusion by stating that United's decision to relocate revolved around profitability and was entrepreneurial in scope. Thus, the decision fell outside the bargaining relationship. *Id.*

¹³⁷ In light of the confusion certain to arise as a result of the three separate opinions of *Otis II*, the General Counsel issued a memorandum attempting to clarify and simplify the decisions of the Board. The Memorandum considered three factors: (1) whether the employer's decision involves a change in the scope, direction, or nature of the business; (2) whether the employer's decision is motivated by labor costs; and (3) whether the employer's decision is amenable to the collective bargaining process and, if so, whether the benefits to labor-management relations outweigh the burdens bargaining would impose upon management. The General Counsel then formulated responses to these three factors which were then used to create a matrix indicating whether the decision should be subject to mandatory collective bargaining. Office of the General Counsel, Memorandum GC 84-12, 1984 WL 50031 at *1, 4 (1984) (N.L.R.B.G.C.).

¹³⁸ See Local 2179, *United Steelworkers of Am. v. NLRB*, 822 F.2d 559 (5th Cir. 1987) (upholding Board use of "turns upon labor costs" as consistent with *First National Maintenance*); *Desoto, Inc.*, 278 N.L.R.B. 788 (1986); *Mack Trucks, Inc.*, 277 N.L.R.B.

any of the *Otis II* opinions” approach, leaving parties and courts unsure as to what factors the Board relied on in making its decision.¹³⁹ Thus, the post-*Otis II* decisions resulted in a lack of clarity and guidance in addressing relocation decisions.

C. Mid-Term Modifications

Cases addressing relocations while a collective bargaining agreement governs the labor-management relationship, like the relocation decisions discussed above, have a rich history of confusion. The confusion in the mid-term relocation decisions centered primarily upon a continuing rift between the Board and the courts. The Board believed that mid-term relocations were per se an unfair labor practice. However, the courts, for the most part, concentrated more on the terms of the existing agreement to determine whether such a relocation decision violated the agreement between the parties and therefore violated the Act.¹⁴⁰ The advent of *Milwaukee Spring Division (Milwaukee*

711 (1985); Bostrom Div., UOP Inc., 272 N.L.R.B. 999 (1984); Fraser Shipyards, Inc., 272 N.L.R.B. 496 (1984); Columbia City Freight Lines, Inc., 271 N.L.R.B. 12 (1984). *But see* Arrow Automotive Indus., Inc., 853 F.2d 223 (4th Cir. 1988) (rejecting the Board’s use of the “turns upon labor costs” approach as inconsistent with *First National Maintenance*).

¹³⁹ See *The Reece Corp.*, 294 N.L.R.B. 448 (1989) (using the “under any view” approach to hold that employer was required to bargain with union over decision to relocate); *FMC Corp.*, 290 N.L.R.B. 483 (1988) (relying on *Milwaukee Spring II* and any of the views expressed in *Otis II*); *Plymouth Stamping Div., Eltec Corp.*, 286 N.L.R.B. 890 (1987), *enforced*, 870 F.2d 1112 (6th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Roytype Div., Pertec Computer Corp.*, 284 N.L.R.B. 810 (1987); *Sands Motel and AMM, Inc.*, 280 N.L.R.B. 132 (1986); *Dahl Fish Co.*, 279 N.L.R.B. 1084 (1986) (using both the “turns on labor costs” and “under any view” to require the employer to bargain with the union over its decision to relocate); *Mack Trucks, Inc.*, 277 N.L.R.B. 711 n.3 (1985) (Member Babson relying on the “under any view” approach).

¹⁴⁰ The case history of midterm modifications is as follows: The first case normally considered is *University of Chicago*, 210 N.L.R.B. 190 (1974). In this case, the University executed an intrafacility transfer of unit workers at the same time the University informed the union of its intent to do so during an existing agreement. The Board held such a transfer violated the Act and therefore resulted in an unfair labor practice. On appeal, however, the court denied enforcement of the Board’s order because the agreement did not specifically prohibit such transfers and the University had fulfilled its *Fibreboard* obligation because the transfer was not motivated by anti-union animus and the University had bargained in good faith with the union to impasse before instituting the transfer. *University of Chicago v. NLRB*, 514 F.2d 942 (7th Cir. 1975). The next significant midterm relocation decision before the Board was *Boeing Co.*, 230 N.L.R.B. 696 (1977). Here, the Board interpreted a recognition clause as prohibiting intraplant transfers, and therefore held the company’s action involved a unilateral modification of the existing agreement violating the Act. Again, on appeal, the court denied enforcement of the Board’s order by interpreting the clause as not prohibiting work transfers, and because the company complied with the two-prong

Spring II)¹⁴¹ appears to have settled the continuing difficulties plaguing this particular area of labor-management relations.

In *Milwaukee Spring II*, the company originally operated three automotive parts facilities.¹⁴² In January 1982, the company sought mid-term concessions by asking the union at the Milwaukee Spring Division to forgo scheduled wage increases.¹⁴³ The union failed to respond to the employer's proposal and in March 1982, because of the loss of a major customer, the company informed the union that without wage and benefit reductions the company would have to

approach set forth in *Chicago*, the court found the company had met its obligation. *Boeing Co. v. NLRB*, 581 F.2d 793 (9th Cir. 1978).

Facing another midterm relocation challenge in *Los Angeles Marine Hardware Co.*, the Board adopted the ALJ's conclusion that the employer violated the Act when it laid off several workers and relocated its operations to different facilities because of economic difficulties. *Los Angeles Marine Hardware Co.*, 235 N.L.R.B. 720 (1978). Although the employer sought concessions from the union, the union refused and so the employer relocated without consulting the union. *Id.* This time, however, the court upheld the Board's conclusion despite failing to indicate where in the agreement a provision existed prohibiting such transfers. *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302 (9th Cir. 1979). This was entirely inconsistent with the previous courts of appeals decisions and specifically appeared to contradict the 9th Circuit's earlier decision in *Boeing*.

The Board upheld its reasoning in *Milwaukee Spring Div.*, *Illinois Coil Spring Co.* (*Milwaukee Spring I*), 265 N.L.R.B. 206 (1982). However, the Board, as in *Otis Elevator*, asked to have the case returned to the Board while the appeal was pending to reconsider its decision in light of *First National Maintenance*.

For extensive discussions of the cases and reasoning involved in reaching midterm relocation decisions by the Board and the courts, see generally Robert B. Mitchell, *Note on the NLRB's Milwaukee Spring II Decision*, 58 TUL. L. REV. 1441 (1984); O'Keefe & Tuohey, *supra* note 41; David W. Barton, *Note, Milwaukee Spring Division of Illinois Coil Spring Co.: The Open Road for Employer Relocations of Bargaining Unit Work During the Term of the Collective Bargaining Agreement*, 17 U. TOL. L. REV. 973 (1986); Claudia Wickham Lane, *Comment, Unfair Labor Practice and Contract Aspects of an Employer's Desire to Close, Partially Close, or Relocate Bargaining Unit Work*, 24 DUQ. L. REV. 285 (1985); JoAnne D. Roake, *Comment, The Spring has Sprung: The Fate of Plant Relocation as a Mandatory Subject of Bargaining*, 24 SAN DIEGO L. REV. 221 (1985); Schwarz, *supra* note 24; Bryan E. Lee, *Recent Development, Labor Costs and Midterm Work Relocation: Unfair Labor Practice or Breach of Contract?*—International Union, United Automobile Workers v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), 61 WASH. L. REV. 1273 (1986).

¹⁴¹ *Milwaukee Spring Div.*, *Illinois Coil Spring Co.* (*Milwaukee Spring II*), 268 N.L.R.B. 601 (1984).

¹⁴² *Id.* at 601 (The three facilities were McHenry Spring, Holly Spring and Milwaukee Spring.).

¹⁴³ *Id.* The work unit at Milwaukee Spring Division was unionized and workers received \$10 per hour as opposed to the McHenry Spring Division, which was non-union with the workers receiving \$5.85 per hour. *Milwaukee Spring I*, 265 N.L.R.B. at 207.

relocate operations to another facility.¹⁴⁴ The union rejected this proposal.¹⁴⁵ Although the company continued to attempt to bargain with the union over its proposed relocation, the union was not cooperative. On April 4, 1982, the company carried out its relocation plan.¹⁴⁶

Upon asking to reconsider the case in light of *First National Maintenance*,¹⁴⁷ the Board reversed its earlier decision rendered against the company.¹⁴⁸ The Board stated that a specific clause "contained in" the agreement had to be modified in order for an unfair labor practice to result. Upon examining the existing agreement, the Board failed to find such a modification.¹⁴⁹ Furthermore, the Board indicated that it was "NLRB textbook law" that an employer did not have to obtain the union's consent on a matter not included in the agreement—even if the subject is a mandatory subject of collective bargaining.¹⁵⁰

The Board went on to accept the appellate courts' analysis of the previous cases and proclaimed that the test should be that unless transfers are specifically prohibited by the agreement, an employer is free to transfer work out of the bargaining unit if (1) the employer bargains in good faith to an impasse; and (2) the employer is not motivated by anti-union animus.¹⁵¹ Conversely, if a subject is "contained in" the agreement, then the employer must obtain the union's consent before modifying the agreement. Because the company did not modify a clause in the agreement when it implemented its relocation decision, the Board found no violation of the Act.

¹⁴⁴ *Milwaukee Spring II*, 268 N.L.R.B. at 601. The employer stated that the operations would be relocated to the McHenry facility.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* The parties stipulated that the decision to relocate was not motivated by anti-union animus, but that the decision was motivated by economic considerations—based primarily on labor costs. *Milwaukee Spring I*, 265 N.L.R.B. at 207.

¹⁴⁷ See *supra* note 140.

¹⁴⁸ *Milwaukee Spring II*, 268 N.L.R.B. at 601.

¹⁴⁹ *Id.* at 602. The Board first surmised that the *Milwaukee Spring I* Board must have found a modification of the agreement's wage and benefits provision. However, the Board rejected this contention and went on to find that the relocation did not modify the recognition clause. *Id.*

¹⁵⁰ *Id.* at 603 (relying on *Ozark Trailers*, 161 N.L.R.B. 561 (1966)).

¹⁵¹ *Id.* at 604 (quoting *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975)). The Board also stated that a distinction had been drawn between midterm work reassignments and midterm work relocations, and such a distinction was not necessary. Thus, the 7th Circuit test is to be applied in the same manner to both types of decisions as "transfers of work." According to the Board, as far as *University of Chicago*, *Boeing* and *Los Angeles Marine* were inconsistent with the present decision, they were overruled. See *supra* note 140.

V. DUBUQUE PACKING¹⁵²

A. *Factual Background*

The Dubuque Packing Company was a closely-held corporation operating beef and hog slaughtering facilities throughout the country.¹⁵³ At all times, a collective bargaining agreement governed the relationship between Dubuque Packing and the union.¹⁵⁴ In 1977, the company began to suffer financial woes and to post substantial losses. As these losses continued, the company found it necessary to seek modifications of the existing collective bargaining agreement in an effort to alleviate the operating losses. The first attempt by Dubuque Packing to get the union to sacrifice contractual entitlements was via a proposed "buy-back" plan in 1978.¹⁵⁵ The buy-back plan involved a one-time cash payment in exchange for an increase in the existing standard of employee output necessary to receive incentive pay.¹⁵⁶ The union accepted this proposal.¹⁵⁷

The buy-back plan, however, failed to alleviate the mounting financial pressures facing the company. In June 1980, the company provided the union with a notice that the company was terminating its beef operations on December 12, 1980.¹⁵⁸ The company indicated that the main problem it faced in attempting to alleviate its losses was the high premiums required by the employees to get full production.¹⁵⁹ As an alternative to closing the beef operations, the company sought another mid-term modification. Dubuque

¹⁵² See Dubuque I, 287 N.L.R.B. 499 (1987). The ALJ's opinion, which was summarily adopted by the Board, provides an exhaustive factual description of the events surrounding negotiations and the relationship between Dubuque Packing and the union. *Id.* at 501-34.

¹⁵³ United Food & Commercial Workers' Int'l Union, Local 150-A v. NLRB, 880 F.2d 1422, 1423 (D.C. Cir. 1989); *Dubuque I*, 287 N.L.R.B. at 500 (At the time of the initial hearings concerning alleged unfair labor practices by Dubuque Packing, the company operated 13 facilities.).

¹⁵⁴ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1423. The Agreement was in effect from September 1979 to September 1982.

¹⁵⁵ *Id.* at 1424.

¹⁵⁶ *Dubuque I*, 287 N.L.R.B. at 501-02. These modifications were made to the then existing 1976-1979 agreement and resulted in an increase of the output requirement by 15%. In a memo to the union, the company acknowledged that the existing incentive program had cost the company \$4.7 million.

¹⁵⁷ *Id.* at 502.

¹⁵⁸ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1424. The company indicated that in 1979 it had lost \$8 million. According to the company, the beef operations were not carrying the company as in the past. The company provided the union with a six-month notice of intent to close as required by the existing agreement. *Id.*

¹⁵⁹ *Id.*

Packing asked the workers to forego all incentive pay while maintaining the existing output level. In return for the union's approval of this mid-term concession, the company promised not to seek any additional modifications for the remainder of the existing agreement.¹⁶⁰ The union accepted the proposal.¹⁶¹ As a result of the modification, the company managed to keep the beef operations going on a month-to-month basis beyond the closing deadline.¹⁶²

As the company was seeking the aforementioned modifications from the union, it was also encountering a great deal of difficulty with its banks. In light of the company's financial difficulties, the banks became increasingly hesitant about continuing to extend credit. In December 1980, the company's consortium of banks announced they were unwilling to provide additional credit necessary for \$5 million of needed improvements to the Dubuque plant. Furthermore, in January 1981, Dubuque Packing's primary lender called an outstanding \$10 million loan due to default.¹⁶³ Thus, despite attempts to ease its troubles, the company's financial difficulties continued.

In response to the banking problems, Dubuque Packing approached the workers again, this time seeking an increase in the chain speed of the hog kill operations.¹⁶⁴ The union refused to grant the concessions, and on March 30, 1981, Dubuque Packing provided the union with notice that it was closing the hog kill and cut operations on September 30, 1980 for economic reasons.¹⁶⁵ Subsequent to the notice, the company sent announcements to all employees at the Dubuque facility, which included a statement informing the workers that

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 1425. In fact, the beef operations at the Dubuque facility remained intact until its final closure and sale in September 1982. Dubuque I, 287 N.L.R.B. 499, 504 n.21 (1987).

¹⁶³ *Id.* For a detailed description of Dubuque Packing's relationships with banks, see *Dubuque I*, 287 N.L.R.B. at 532-34. Mercantile Bank of St. Louis notified Dubuque Packing that the remaining loan would be due March 31, 1981. In addition, a revolving line of credit granted by the bank would also be cut off. Dubuque Packing immediately sold off two plants, one in Wichita, Kansas, and the other in south San Francisco, California. The company also made several other cost-cutting measures in an effort to avoid the recall of the debt; however, all proved ineffective and the debt was recalled. *Id.* at 533.

¹⁶⁴ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1425. The chain speed simply means the number of hogs slaughtered per hour. Dubuque II, 303 N.L.R.B. no. 66, 1991 WL 146795, at *3 (1991). Also, recall that Dubuque sought the concession despite its previous promise not to seek any additional concessions for the remainder of the 1979-1982 agreement. See *supra* notes 158-61 and accompanying text.

¹⁶⁵ *Dubuque I*, 287 N.L.R.B. at 509 (providing the six-month notice of an intended closure as required by the existing agreement). The termination of the hog kill and cut operations was to result in the loss of approximately 500 jobs. *Id.* at 507.

pork slaughterers paying \$16.00 per hour were going out of business while those paying \$8.00 per hour were able to expand their businesses.¹⁶⁶

Additionally, in May 1981, a local newspaper recovered a "confidential" memorandum from the garbage, which it published, indicating that if the workers of the Dubuque facility agreed to concessions, there was a chance to save the hog kill and cut operations.¹⁶⁷ The published memo was the first indication that union concessions could save the hog operations.¹⁶⁸ In June 1981, the company informed the union that if it agreed to a plant-wide wage freeze, the company would revoke its plans to eliminate the hog kill and cut operations.¹⁶⁹ The company went so far as to "guarantee" that the hog kill and cut operations would remain for the balance of the agreement if the union would provide the necessary concessions.¹⁷⁰ In exchange for the concessions, the company offered a profit-sharing plan, which would provide the unit workers with a percentage of any profits resulting from the wage freeze.¹⁷¹ The union rejected the proposal.¹⁷²

¹⁶⁶ *Id.* at 508. The union, of course, countered the above information with statements indicating that the problems of the industry were much more far-reaching. *Id.* at 509.

¹⁶⁷ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1425-26. The manner in which this memorandum came into the local newspaper's possession was not revealed. However, the authenticity of the confidential memorandum was never disputed. *Dubuque II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *12 n.24. The memorandum indicated that if labor costs remained at the present level, the company might be able to keep its plant open. Furthermore, the memorandum indicated that the company had lost about \$6.2 million in 1980, much of which was attributable to labor costs. *Dubuque I*, 287 N.L.R.B. at 508.

¹⁶⁸ *Dubuque I*, 287 N.L.R.B. at 508.

¹⁶⁹ *Id.* at 509.

¹⁷⁰ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1426. The company made its position known through a statement made in response to a Chamber of Commerce offer to mediate the situation between the company and the union. The union rejected the Chamber of Commerce's offer. *Dubuque I*, 287 N.L.R.B. at 509.

¹⁷¹ *Dubuque I*, 287 N.L.R.B. at 510. According to the ALJ, the plan could be summarized as follows:

[I]f management's . . . proposal was agreed to, the employees' pay rate would be frozen at \$10.02 an hour through [September 1, 1982], but they then would receive profit sharing in the event of profits. The . . . closing of the hog cut and kill and the beef kill would be rescinded for at least the term of the then-current collective-bargaining agreement, and the continuation of those operations would be guaranteed for the next 15 months.

Id.

¹⁷² *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1426. The wage freeze would result in the wages being frozen at \$10.02 per hour. This involved a sacrifice by the union of four cost-of-living increases throughout the course of the

The company then released a press statement indicating that it would proceed with its plans to terminate the hog kill and cut operations. Furthermore, for the first time, the company revealed its "alternative plan."¹⁷³ The alternative plan was to relocate a portion of the Dubuque operations to a facility purchased in Rochelle, Illinois.¹⁷⁴ In light of the company's latest "surprise," the union reconsidered accepting the company's wage freeze proposal, but again rejected the desired concessions.¹⁷⁵ The company then stated that its plans to discontinue the hog kill and cut operations were final and that the company's action was "motivated solely by economic factors."¹⁷⁶ Despite this statement, the company continued to seek wage reductions to no avail. In October 1980, the hog kill and cut operations began at the Rochelle plant and ceased at the Dubuque plant. Despite the relocation and hopes of improved prosperity, Dubuque Packing Company was forced to close and sell both its Rochelle and Dubuque facilities in October 1982 because of a failure to obtain necessary financing.¹⁷⁷

agreement. The company proposed that the freeze go into effect on July 1. In addition to its other promises, the company stated that management wages would be frozen as well. *Dubuque I*, 287 N.L.R.B. at 508, 510.

¹⁷³ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1426. The union was completely unaware of any "alternative plan" and its respective consequences. *Id.*

¹⁷⁴ *Id.* The effect of the relocation would be the elimination of 1,400 jobs as opposed to the original estimation of 500. *Id.*; see *supra* note 165. Furthermore, the company had options to lease two slaughterhouses, one in DuQuion, Illinois and the other in Des Moines, Iowa. These options, however, were permitted to expire because of the purchase of facilities in Rochelle, Illinois. The facilities at Rochelle were supposedly better designed and more efficient. *Dubuque I*, 287 N.L.R.B. at 511, 529.

¹⁷⁵ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1427. Also during June and July, a major dispute developed as the union wanted access to the corporate books of each facility in order to determine the actual nature of the losses the company reported as well as the feasibility of the offered profit-sharing plan. After a prolonged dispute, the company permitted an auditor of the union's choice to review material and make a report. This report, however, was subject to further review and amendment by Price Waterhouse, an international accounting firm. The union later argued that the company's failure to produce the "books" upon request was a breach of the company's duty to provide the books and bargain in good faith. *Dubuque I*, 287 N.L.R.B. at 510-29.

¹⁷⁶ *Dubuque I*, 287 N.L.R.B. at 515.

¹⁷⁷ *Id.* at 529.

B. Procedural History

The union filed charges against Dubuque Packing alleging unfair labor practices.¹⁷⁸ The ALJ's opinion relied wholly on the *Otis II* plurality and held that the company's decision to relocate its hog kill and cut operations to Rochelle did not turn upon labor costs and, therefore, was not subject to mandatory bargaining. Although admitting that labor costs were a factor, the ALJ stated that the company's decision turned upon "the long-term improbability of continuing work in Dubuque."¹⁷⁹ According to the ALJ, the essence of the company's decision had to be evaluated against the backdrop of the serious financial difficulties facing the company.¹⁸⁰

Although modifications were sought and made while the agreement was in effect, the ALJ held that *Milwaukee Spring II* did not apply because the agreement provided that the company could transfer jobs as necessary.¹⁸¹ Thus, because there was no work preservation clause, the company met its obligation by bargaining in good faith to an impasse over its decision.¹⁸²

The ALJ went on to hold that the company's surprise alternative plan only resulted in misinformation to the union.¹⁸³ However, because the employer did not have to bargain with the union concerning a decision to relocate or to partially close its operations, the misinformation did not result in an unfair labor practice.¹⁸⁴ Furthermore, because the company was under no duty to bargain concerning the relocation decision, the promise made by the company that it would not seek additional concessions from the union for the term of the agreement was irrelevant. The ALJ refused to penalize the company for seeking concessions if it did not even have to bargain with the union over the decision to relocate.¹⁸⁵ Finally, because the company had no duty to bargain

¹⁷⁸ *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1427. The union filed two separate charges, one on June 26 and the other on August 7, 1981. They were consolidated in the hearings before the ALJ. *Id.*

¹⁷⁹ *Dubuque I*, 287 N.L.R.B. at 537.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 535. The agreement provided in relevant part:

21.1 The Company has the right to discontinue, combine, transfer, or split a job or jobs as the necessities of the business may require. Before taking such action, the Company shall give the Union in writing the changes desired together with the results to be obtained in making the proposed change

Id.

¹⁸² *Id.* at 536. See *supra* part IV.C.

¹⁸³ *Id.* at 538-39.

¹⁸⁴ *Id.* at 538 n.124.

¹⁸⁵ *Id.* at 539.

and its decision to relocate was motivated by economic considerations, not anti-union animus, the ALJ found no violation of the Act.¹⁸⁶

The Board summarily adopted the rulings, findings, and conclusions of the ALJ.¹⁸⁷ Two members of the Board, however, added that under any of the views of *Otis II*, the company would not have been obligated to bargain with the union over its relocation decision.¹⁸⁸ In a somewhat condescending opinion, the Court of Appeals for the District of Columbia remanded the case, scolding the ALJ and the Board for the lack of reasoning in *Dubuque I* as well as the lack of consistency and failure to live up to their responsibility in addressing employer relocation decisions.¹⁸⁹

The court first concluded that in light of *First National Maintenance, Otis II* was a reasonable approach to employer relocation decisions.¹⁹⁰ The court noted that despite its shortcomings, *Otis II* provided simplicity and predictability.¹⁹¹

The court then stated that the ALJ opinion lacked the reasoning necessary for an appellate review because of its failure to demonstrate the factors relied upon in concluding that the company's decision did not turn upon labor costs.¹⁹² The court then suggested that two basic ingredients required examination when deciding if a relocation decision was subject to collective bargaining. First, the relevant factors must have pre-dated or have been contemporaneous with the decision itself. Second, the judicial or administrative review must involve a review of what was "actually in the minds of those making the decision."¹⁹³ The court concluded that the ALJ's opinion was merely an exercise in justifying the employer's decision.¹⁹⁴

The court then turned its attack to the summary affirmance of the ALJ's opinion by the Board. The court cited three items neglected by the Board in its review of the case. First, the court criticized the Board for its "under any of the views expressed in *Otis II*" approach.¹⁹⁵ The court stated that while there were

¹⁸⁶ *Id.* at 541.

¹⁸⁷ *Id.* at 499. The Board adopted the ALJ's conclusion and order in a twenty-line written opinion.

¹⁸⁸ *Id.* at 499 n.1.

¹⁸⁹ *United Food & Commercial Workers' Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1423, 1439 (D.C. Cir. 1989).

¹⁹⁰ *Id.* at 1432-34. In fact, the court held that in light of *First National Maintenance*, it was difficult to argue that relocation decisions created a duty to bargain in good faith. *Id.* at 1433. Furthermore, according to the court, it was difficult to maintain that the Board was required by *First National Maintenance* to come up with an approach that would require bargaining anytime labor costs were a factor. *Id.*

¹⁹¹ *Id.* at 1434.

¹⁹² *Id.* at 1434-35.

¹⁹³ *Id.* at 1434.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1436.

similarities between the three different approaches, there were also fundamental differences—differences that made it preposterous for the Board to state that any *Otis II* approach would apply to Dubuque Packing's decision to relocate.¹⁹⁶ The court urged the Board to accept responsibility for "clarifying and identifying the standards guiding its decisions" and to attempt to formulate a majority-supported opinion.¹⁹⁷

Second, the court criticized the Board's failure to reconcile *Dubuque I* with prior decisions.¹⁹⁸ The Board's failure to indicate distinctions between the cases troubled the court.¹⁹⁹

Finally, the court noted that the Board had failed to address the argument that even though the employer was under no duty to bargain over its mid-term decision to relocate, the employer's duty to bargain did arise when it sought concessions involving wages and benefits.²⁰⁰ Thus, despite the fact that the employer may not have been under a duty to bargain over its decision to relocate, the Board needed to elaborate on why the company was not under a duty to bargain over the mandatory subjects brought to the bargaining table.²⁰¹

C. Dubuque Packing II

On remand, the Board acknowledged its responsibility, and in response to the court's urging, developed a "new test" for determining whether an employer's decision to relocate should be subject to mandatory collective bargaining.²⁰²

In the first step of its analysis, the Board compared *Fibreboard* and *First National Maintenance* and developed three considerations for determining if a

¹⁹⁶ *Id.* at 1436–37. The court pointed out that under Zimmerman's approach, bargaining may be required even if the decision did not turn upon labor costs, so long as labor concessions *might* be made. *Id.* at 1436 (emphasis added). The court did not understand how, in light of the company's continued seeking of union concessions, the Board could hold that under the Zimmerman approach the decision was not amenable to resolution through the collective bargaining process. *Id.* at 1437. Furthermore, the court expressed doubts as to how both the plurality and Dennis' two-step approach could be met due to the apparent amenability of the decision in light of the facts of the case. *Id.*

¹⁹⁷ *Id.* at 1436–37. The court declared that the Board had crossed the line between "tolerably terse" and "intolerably mute" by expressing such an opinion without elaboration. *Id.* at 1437 (relying on *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

¹⁹⁸ *Id.* at 1437.

¹⁹⁹ *Id.* Specifically, the court cited *Plymouth Stamping Div.*, 286 N.L.R.B. no. 85 (1987), *enforced*, 870 F.2d 1112 (6th Cir. 1989) as a similar case with a different conclusion.

²⁰⁰ *Id.* at 1438.

²⁰¹ *Id.*

²⁰² *Dubuque Packing II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *4 (1991).

relocation decision more closely resembled subcontracting—in which case it would be subject to mandatory collective bargaining under *Fibreboard*, or partial closings—in which case it would not be subject to mandatory collective bargaining under *First National Maintenance*.²⁰³ First, the Board looked at whether the decision resulted in the replacement of employees.²⁰⁴ The Board found that relocations resulted in the replacement of one group of employees with another group of employees performing the exact same work at different facilities.²⁰⁵ Thus, because different workers were performing the same tasks, relocations resembled subcontracting. Second, the Board considered whether relocation decisions altered the scope and direction of the business operations.²⁰⁶ The Board decided that a relocation decision “presupposes that the employer intends to continue in business with the unanswered question being where the business entity will be in operation.”²⁰⁷ A decision to conduct business at one location rather than another, “standing alone, does not generally involve a ‘managerial decision . . . concerning the basic scope of the enterprise. . . .’”²⁰⁸ Therefore, the Board stated that relocation decisions did not alter the business’ direction. Finally, the Board examined the type of cost considerations in the two Supreme Court cases.²⁰⁹ The Board explained that because relocation decisions involved the replacement of employees, it logically followed that the labor cost for one group of employees versus another group was an important consideration.²¹⁰ In view of these three considerations, the Board decided that relocation decisions more closely resembled *Fibreboard* and, therefore, were particularly susceptible to resolution via collective bargaining.²¹¹

In view of the Board’s conclusion that relocation decisions were amenable to the collective bargaining process, the Board then developed its “new test.” Under the new test, the initial burden for showing that the relocation decision is subject to mandatory collective bargaining rests upon the General Counsel, who must demonstrate that the relocation will not result in a basic change in the business’ operations. Upon demonstrating this, the General Counsel establishes a *prima facie* case that the employer’s decision to relocate is subject to

²⁰³ *Id.* at *8.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* The Board stated that “without more,” the mere decision to relocate did not alter a company’s basic operation because the company was still producing the “same product for the same customers under essentially the same working conditions.” *Id.*

²⁰⁹ *Id.* The Board indicated that the *First National Maintenance* decision turned upon a management fee while the *Fibreboard* decision turned upon a desire to reduce labor costs.

²¹⁰ *Id.* at *8–9 & n.12.

²¹¹ *Id.* at *9.

mandatory collective bargaining.²¹² The burden then shifts to the employer, who may rebut the prima facie . . . case or prove one . . . of two things. First, the employer may show, by a preponderance of the evidence, that labor costs were not a factor (direct or indirect) in the decision to relocate. Second, the employer may show that even if labor costs were a factor in the decision to relocate, the union could not have offered concessions that would have altered the employer's decision.²¹³

The Board proceeded to apply its new test. The Board indicated that there was no evidence whatsoever that the company's relocation would result in a change of operations.²¹⁴ Therefore, the burden shifted to the company to prove one of the two prongs of the test. Relying on the ALJ opinion, the Board found that labor costs clearly were a factor in the company's decision to relocate to Rochelle.²¹⁵ Thus, the first prong was unavailable to the company. As for the second prong, the Board stated it, too, was exempt from the company's use. After reviewing the facts of the case at length, the Board stated that despite the numerous financial problems the company faced, the fact that the company continually sought concessions from the union regarding labor costs established that bargaining would be productive.²¹⁶ Thus, the Board concluded that

²¹² *Id.*

²¹³ *Id.* As an example of the second prong, the Board stated that if an employer could show that the costs of modernization exceeded any concessions the union might be able to offer, then the employer would not have a duty to bargain with the union over its decision to relocate. The Board also noted that an employer would enhance its chances of success under this prong of the test if the employer described to the union its reasons for relocating, fully explained the costs and benefits of the relocation, and asked the union if it could offer labor cost concessions that would enable the employer to meet its objectives without relocating. *Id.*

²¹⁴ *Id.* at *10.

²¹⁵ *Id.* at *10-11 (emphasis added) (quoting Dubuque I, 287 N.L.R.B. 499, 537 (1987)).

²¹⁶ *Id.* at *11-16. The facts of the case indicated that if the labor cost concessions (i.e., the wage freeze) could be gained, the Dubuque plant would remain open. The hope was that these concessions would draw a favorable response from the banks and, therefore, improve the flow of credit. Even after the union rejected the wage freeze, the company continued to seek concessions, stating that if the concessions were obtained, the Dubuque facilities could be saved. *Id.* at *12-13. Thus, because the company so diligently sought the concessions, it was unable to argue that financial difficulties would have forced relocation even with union concessions. The company also attempted to argue that the Rochelle plant offered much more modern and efficient facilities than did the Dubuque plant and that relocation was a necessity in light of the company's failure to obtain the financing necessary to modernize the Dubuque facilities. *Id.* at *14. The Board disregarded the company's arguments because the record was devoid of any description of the Rochelle facilities. Furthermore, there was nothing to indicate the superior technology of either the Rochelle facilities or the two facilities on which the options were permitted to expire because the company apparently never sent anyone to inspect any of the considered facilities. *Id.* at *15.

because the company persistently sought concessions, the union could have offered concessions that would alter the employer's decision.²¹⁷ After applying the new test to the facts of the case, the Board reversed its earlier decision and held that the company failed to bargain in good faith with the union as required by the Act.²¹⁸

VI. ANALYSIS AND SUGGESTED APPROACH

A. *Analysis of Dubuque II*

Dubuque II represents a step backward rather than a step forward in resolving the problem of whether an employer's decision to relocate should be subject to mandatory collective bargaining. Although urged by the court of appeals to formulate a consistent majority-supported opinion concerning decisions to relocate,²¹⁹ the Board formulated an approach not only inconsistent with *First National Maintenance* but also inconsistent with the purposes of the Act.

The Board's initial reasoning is fundamentally flawed. In creating the three distinctions between *Fibreboard* and *First National Maintenance*, the Board appears to be operating on the assumption that *First National Maintenance* mandates a per se rule that all partial closures are *not* mandatory subjects of collective bargaining while all decisions to contract out labor are.²²⁰ Relying on such a premise is wrong, despite commentary suggesting the contrary.²²¹

In *First National Maintenance*, the Court specifically limited the holding to the facts of the case.²²² The Court never suggested that all partial-closing decisions would necessarily reach the same result. If it were a per se rule, there was really no need for the balancing test; the Court could have simply held that decisions to partially close operations do not fall within "terms and conditions of employment." Furthermore, to suggest that all decisions to subcontract are subject to mandatory collective bargaining is inconsistent with the limited holding of *Fibreboard* as well as subsequent case law. For instance, in *NLRB v.*

The Board went on to summarily dismiss the company's defenses of contractual waiver and the union's failure to timely request bargaining. *Id.* at *16-18.

²¹⁷ *Id.* at *16.

²¹⁸ *Id.* at *18-19. The company violated, *inter alia*, sections 8(a)(5) and (1). Because the Board found that the company did have a duty to bargain with the union, the Board did not have to address the issue created by the company seeking midterm modifications of wages. See *United Food & Commercial Workers' Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1438 (D.C. Cir. 1989).

²¹⁹ See *supra* notes 187-201 and accompanying text.

²²⁰ See *Dubuque II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *8.

²²¹ See generally sources cited *supra* note 88.

²²² *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 687 (1981).

Adams Dairy, the Eighth Circuit held, in light of *Fibreboard*, that a decision to subcontract labor, motivated by economic considerations, did not require collective bargaining with the union.²²³

The essence of the approach formulated by the Board merely results in a return to the "rebuttable presumption" approach specifically criticized and rejected in *First National Maintenance*.²²⁴ Under *Dubuque II*, while the union has an initial threshold requirement to show that no substantial change in the nature of the employer's operations has occurred, the burden is upon the employer to rebut the presumption that its decision turned upon labor costs, or even if the decision did turn upon labor costs, that the union could not have offered concessions to get the employer to change its decision to relocate.²²⁵

The Supreme Court rejected the rebuttable presumption test due to its inherent shortcomings. Primarily, the Court stressed that the rebuttable presumption test resulted in a lack of predictability for employers.²²⁶ The employers would be uncertain as to whether they could rebut the presumption that they must bargain.²²⁷ This uncertainty is due to the variety of different factors the reviewing body may consider and the different weights it could place on them.²²⁸ Thus, an employer would encounter great difficulty in determining when and to what extent it must bargain over its decision, and would feel obligated to bargain over all decisions regardless of amenability to the collective bargaining process.²²⁹

It is clear from the Court's discussion in *First National Maintenance* that it disdained the rebuttable presumption approach to mandatory collective bargaining.²³⁰ The Court stated that the presumption analysis seems "ill-suited

²²³ *NLRB v. Adams Dairy*, 350 F.2d 108 (8th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966). The court went to great lengths to demonstrate the differences between this case and *Fibreboard*. *Adams Dairy* involved terminating its driver/salesman line and replacing it with independent contractors. The court held that the result of the decision was a change in the basic operation of the business. *Id.*

²²⁴ See *supra* notes 84-104 and accompanying text. The Board has recently referred to its *Dubuque II* decision as a "presumption rebutting analysis." *Noblit Bros., Inc. v. Teamsters Union, Local 115*, 305 N.L.R.B. no. 37, 1991 WL 208820, at *2 n.9 (1991); see also *McArthur*, *supra* note 62, at 290-91.

²²⁵ See *supra* notes 211-12 and accompanying text.

²²⁶ *First Nat'l Maintenance Corp.*, 452 U.S. at 684-85.

²²⁷ *Id.* See also *Heinsz*, *supra* note 41, at 93-94, 108 (1981); Terri Ann-Weston Willits, Recent Development, *Labor Law—First National Maintenance Corp. v. NLRB—Employer's Duty to Bargain Over Partial Closures*, 7 J. CORP. L. 381, 388-89 (1981).

²²⁸ See, e.g., *ABC Trans-Nat'l Transport, Inc. v. NLRB*, 642 F.2d 675 (3d Cir. 1981); *Equitable Gas Co. v. NLRB*, 637 F.2d 980 (3d Cir. 1981); *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596, 599-601 (2d Cir. 1980), *rev'd*, 452 U.S. 666 (1981); *Brockway Motor Trucks, Inc. v. NLRB*, 582 F.2d 720 (3d Cir. 1978).

²²⁹ *First Nat'l Maintenance Corp.*, 452 U.S. at 685.

²³⁰ See *supra* notes 84-104 and accompanying text.

to advance harmonious relations between employer and employee.”²³¹ Such sweeping language seems to apply to all areas of decision bargaining. It is unlikely that a presumption analysis would be “ill-suited to advance harmonious relations between employer and employee” in partial-closure decisions, but not in relocations. In light of such explicit language by the Court, it is difficult to ascertain why the Board digressed from its trend toward balancing and chose to use a presumption analysis.

The rebuttable presumption approach is also inconsistent with the Act.²³² The presumption test used in *Dubuque II* is not only unfair to management, but it also potentially harms labor. The purpose of the Act is to promote the free flow of commerce and industrial peace by equalizing the bargaining power between labor and management.²³³ Congress designed the Act to place labor on equal ground with management by building bargaining requirements into the labor-management relationship. Arguably, such presumptions are justified because the employer clearly has greater access to information and is clearly more aware of why it is choosing to relocate than the union. Nevertheless, the Act itself placed the parties on equal ground so that they could negotiate fairly. By creating presumptions against the employer, the Board is merely reversing the inequality that once existed between labor and management, putting management at a disadvantage because of the uncertainty and additional burdens created by the rebuttable presumption approach. The result of the created “presumptions” is to require employers to bargain with the unions over decisions whose outcomes the union can in no way change. Although the Act equalized the playing field, there are still some decisions that are, by their nature, only within the discretion of management. The presumption analysis merely creates additional hurdles management must clear before it can make a decision concerning the strategic future of the business operations. Such an approach hardly promotes peace and cooperation, nor does it equalize the relationship of the parties. Rather, it simply wastes the time and resources of all parties involved.

The *Dubuque II* approach may also adversely affect labor. In *Dubuque II*, the Board cited the company’s continual seeking of concessions as the primary evidence that the union could have offered concessions and thereby influenced the employer’s decision, thus defeating the second prong of the “rebuttable presumption.”²³⁴ While such reasoning appears valid, it defeats itself and the Act. By stating that seeking concessions was the primary evidence of the union’s ability to change the employer’s decision, the signal sent to employers is clearly to avoid seeking concessions in the first place. Absent direct evidence

²³¹ *First Nat’l Maintenance Corp.*, 452 U.S. at 684.

²³² See *supra* part II for a complete discussion of the Act and its legislative history.

²³³ See *supra* notes 10–18 and accompanying text.

²³⁴ *Dubuque Packing II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *11–16 (1991).

that the union may be able to make concessions, the employer can more easily rebut the presumption of its duty to bargain. Clearly, the "new test" runs amok with the Act and results in unfairness to both management and labor.

Unlike the approaches set forth in *Otis II*, the new test is not defensible.²³⁵ It has no basis in the Act or in Supreme Court precedent. Because of the above insufficiencies, whether the Board appropriately applied its new test makes little difference.

B. *The Approach of First National Maintenance*

Many have been quick to criticize *First National Maintenance*, but slow to provide any further guidance.²³⁶ This Comment suggests that the balancing test set forth in *First National Maintenance* is the approach that should apply to relocation decisions.

The Court in *First National Maintenance* explicitly stated that its decision concerning the partial closure did not express any view on relocation decisions.²³⁷ Just because the Court left the relocation decisions open, however, did not necessarily mean to imply that the Board should no longer apply the balancing test to relocation decisions. It has been strongly suggested that while the Court did not require that its balancing test be used in other types of management decisions, the nature of *First National Maintenance* mandated some type of benefit/burden analysis.²³⁸ In upholding the reasonableness of the *Otis II* approaches, the courts found that *First National Maintenance* left the area of relocation decisions open. Because of this, the courts could not say labor costs or amenability were not such important factors that an opinion dealing with an employer's decision to relocate could not turn upon these factors.²³⁹ Thus, while the Court intimated no view as to other types of management decisions, *First National Maintenance* pushed the Board toward some type of balancing approach. Although the *Otis II* standards were divergent, they each involved a balancing of the factors, however subtle, in management's decision.²⁴⁰ The result in *Dubuque II* is a complete departure from this direction.

Commentators consistently criticize the Court's approach in *First National Maintenance* for over-emphasizing management's interest while conveniently

²³⁵ See *United Food & Commercial Workers' Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1432-34 (D.C. Cir. 1989).

²³⁶ See *supra* note 88; see also *Local 2179, United Steelworkers of Am. v. NLRB*, 822 F.2d 559, 575 n.22 (5th Cir. 1987).

²³⁷ See *supra* note 102.

²³⁸ *Local 2179, United Steelworkers of Am.*, 822 F.2d at 575 n.23.

²³⁹ See *United Food & Commercial Workers' Int'l Union, Local 150-A*, 880 F.2d at 1433-34; *Local 2179, United Steelworkers of Am.*, 822 F.2d at 578-80.

²⁴⁰ See *supra* notes 124-37 and accompanying text.

under-emphasizing labor's interest.²⁴¹ However, this criticism is unfounded. In *First National Maintenance*, when balancing the benefit of the collective bargaining process and labor-management relations against the burden placed on the employer's conduct of the business, the Court considered the union's need to provide job security and fair dealing on behalf of its workers and the management's need for speed, flexibility, secrecy, profitability and confidentiality.²⁴² The Court indicated that the union's needs were adequately protected by the Act because Congress designed the Act to balance the scales that long favored management.²⁴³ Thus, when applying the balancing test, the extent of protection received by the union via federal legislation must be considered as a factor weighing in favor of the employee interests.²⁴⁴

When applied properly, the language of the balancing test offers a novel approach to resolving disputes over which decisions are subject to mandatory collective bargaining. The test is not only consistent with the Act, but it also provides flexibility in the dynamic, ever-changing environment of labor relations.

The history of the Act specifically indicates that no set formula was to provide the answer for what is and is not subject to mandatory collective bargaining. Rather, what is subject to decision bargaining must depend upon the industry, the current economic and political climate, the needs of the bargaining parties, and any other relevant factors.²⁴⁵ The balancing test is flexible enough to accommodate these requirements, as opposed to a rebuttable presumption test or any other test that results in a "set formula." The key is to make sure that the factors of the balancing test are each properly examined in light of the surrounding circumstances. Therefore, when properly applied in a "comprehensive" manner, the balancing test is perhaps the only truly adequate means for determining whether a decision to relocate is subject to mandatory collective bargaining. The bottom line is that the balancing approach is more consistent with the Act and should be adopted rather than the rebuttable presumption approach. Although ultimately some decisions will never reach the table, the Act was never meant to deprive management of such decisions that are peculiarly within its sphere and beyond the union's. Rather, the Act was

²⁴¹ See *supra* note 88.

²⁴² *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 681-82 (1981).

²⁴³ See *id.* at 677-83.

²⁴⁴ See generally Joseph R. Knight, Note, *Decision-Bargaining and the NLRA—A Plea for the Resurrection of First National Maintenance Corp.*, 68 TEX. L. REV. 625, 640-42 (1990) (Knight suggests that the balancing test was applied constitutionally in light of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), because the Act equalized the scales between labor and management. If the Court only engaged in simple balancing, it would have been unconstitutional due to infringement upon the Commerce Clause and management's decisionmaking power.).

²⁴⁵ See *supra* note 22 and accompanying text.

meant to bring the employer and the union together to bargain over those items amenable to the collective bargaining process.

Admittedly, however, just as the presumption approach failed to provide certainty for management in determining whether it is required to bargain over its decision to relocate, the balancing test encounters similar difficulty in this capacity. In a field of law governed by dynamic change, economic forces, and contractual relationships, it is difficult to develop an approach that will consistently yield a definite outcome. Yet, at least under the balancing test, the employer can look at the totality of the circumstances, know the factors and the weights assigned to them, and then fairly and accurately determine whether it must bargain with the union over a decision to relocate. There will be no senseless preliminary hurdles to overcome. Also, as the test is applied to various situations by the Board and the courts, with the factors of their decisions articulately delineated, patterns will eventually develop as to the facts and circumstances surrounding those types of cases which require mandatory collective bargaining.

It is imperative, however, that a per se approach never evolve. Such a result is inconsistent with the purposes of the Act. What is subject to collective bargaining depends, at any given time, upon the industry, political, and social trends, as well as upon employer/employee needs and numerous other considerations.²⁴⁶ While it provides certainty, a per se approach is inherently unfair to the parties because it fails to consider their respective needs and the current environment of a unique situation at any given time. The industry and the labor market are dynamic and complex environments. A single unbending, inflexible rule cutting across all situations, without considering the specifics of a particular situation, only performs a disservice to the goals of collective bargaining.

C. *Suggested Approach*

The Board and the courts should use the *First National Maintenance* balancing test to determine whether a decision by an employer to relocate is subject to mandatory collective bargaining. In examining the benefits of the collective bargaining process and labor-management relations, two overlapping factors must be considered. These two overlapping factors are (1) the nature of the relationship between labor and management; and (2) the nature of management's decision. Both of the factors must be viewed in light of the facts of the particular case. The goal in examining the two factors is to determine if the decision is amenable to collective bargaining. Unlike Member Dennis' approach, determining amenability is a goal of the balancing test.²⁴⁷ It seems

²⁴⁶ *Id.*

²⁴⁷ See *supra* note 92 and accompanying text.

absurd to use amenability as a threshold requirement when the determination of amenability, in and of itself, requires a balancing of the different factors—without acknowledging exactly what the factors are.²⁴⁸ By not expounding the factors relied upon in the initial determination of amenability, Dennis' two-step approach merely results in a pre-determined outcome.

First, examining the nature of the relationship will depend greatly upon whether the union is able to offer concessions *or alternative ideas* to the employer's intended relocation.²⁴⁹ This, in turn, requires looking at the totality of the surrounding circumstances, the industry practices, and the past bargaining relationship between the employer and the union.

Second, in examining the nature of the decision, the plurality opinion in *Otis II* is applicable.²⁵⁰ Whether the decision turns upon labor costs or a change in the nature, scope, or direction of the business will have a significant impact on whether such a decision should be bargained over or unilaterally made. Also, the extent of competing economic considerations must be examined. Unlike the *Otis II* "turns on labor costs" analysis, the labor costs must be viewed relative to the change in the nature of the business rather than requiring mandatory bargaining only when the decision turns "solely" upon labor costs.²⁵¹ Thus, labor costs are "a" factor, not "the" factor. Other factors, including the employees' interests in job security and fair dealing, must be placed upon the scales. Under the proposed balancing test, the key is to always consider all of the relevant factors consistently.

After considering the benefits of requiring bargaining, the next consideration is the burden of mandatory bargaining on management decisionmaking. The burden factors have been well delineated throughout the various administrative and judicial decisions. The burden factors examined include the need for speed, the need for flexibility, the need for secrecy, the importance of profitability, the extent of capital commitment, the extent of changes in operations,²⁵² and consumer/customer considerations.²⁵³ However,

²⁴⁸ *First National Maintenance* indicated that the initial step was to determine the type of management decision, then to apply the balancing test to determine the amenability of the decision to the collective bargaining process. Amenability was the goal of the test, not a preliminary hurdle. See *supra* notes 90–100 and accompanying text.

²⁴⁹ The possibility that while the union may not be able to offer concessions, but may perhaps be able to offer alternatives or different perspectives not previously considered by the employer for whatever reasons appears consistent with the "communication benefit" propounded by George, *supra* note 10, at 699–703. However, George's approach differs in that he supported Member Dennis' two-step approach. *Id.*

²⁵⁰ See *supra* notes 124–29 and accompanying text.

²⁵¹ See *id.*

²⁵² *Otis II*, 269 N.L.R.B. 891, 897 (1984) (Member Dennis, concurring) (citing *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 680, 682–83, 688 (1981)).

the need for speed, secrecy and flexibility will not be as prevalent in relocation decisions as in partial-closure decisions, because relocation decisions typically require substantial planning and advance study.²⁵⁴

Requiring an employer to bargain with the union over a decision to relocate will depend upon the facts of the particular case, rather than a set formula. This is not a two-prong, or two-part test. Rather, the proposed approach is simply a "comprehensive" balancing test as set forth in *First National Maintenance*. Everything must be placed upon the balancing scales and examined from that perspective. This test is consistent with the Act, and when applied in a principled and consistent manner it promotes fairness, and eventually certainty and predictability—to the extent possible in this area of law.

D. Application of the Comprehensive Balancing Test to Dubuque II

As an example of how this "comprehensive" balancing test would work, this section applies the above-outlined approach to *Dubuque II*. First, in examining the nature of the relationship, the past relations between the parties must be considered. According to the facts, the parties had several successive agreements governing their relationship.²⁵⁵ Furthermore, it is evident from the acceptance of the "buy-back" and the continual negotiations between the parties resulting in amendments to the Agreement, it is evident that the union and the company were willing to work together and that the union was at least somewhat cooperative with the company in attempting to help the company overcome its financial problems.²⁵⁶ Overall, the nature of the parties' relationship suggests that the decision may have been amenable to resolution through collective bargaining. There is no evidence, however, concerning industry practices with regard to relocation decisions.

Second, the nature of the decision must be examined. As *Dubuque II* correctly indicated, labor costs were a crucial factor in the company's decision to relocate the hog kill and cut operations.²⁵⁷ The company continually indicated in press releases, announcements to employees, and statements made while negotiating that labor costs were crucial.²⁵⁸ The company believed that

²⁵³ Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, *enforced*, 602 F.2d 1302 (9th Cir. 1979).

²⁵⁴ George, *supra* note 10, at 710, 712–15.

²⁵⁵ Dubuque I, 287 N.L.R.B. 499, 500 (1987).

²⁵⁶ *Id.* at 501–34.

²⁵⁷ Dubuque II, 303 N.L.R.B. no. 66, 1991 WL 146795, at *10 (1991) (quoting *Dubuque I*, 287 N.L.R.B. at 537).

²⁵⁸ See *supra* note 256 and accompanying text. The company continually stated that if the union would agree to wage concessions, the hog kill and cut operations could be saved.

reducing labor costs would enable the company to obtain the necessary financing required to maintain operations at the Dubuque facility. Thus, because labor costs were a significant factor in the company's decision, the company had increased incentive to bargain with the union over its decision to relocate. It is also clear from the facts that the nature or scope of Dubuque Packing's business was not going to change.

As for other economic considerations, the company cited that the Dubuque facilities were inadequate compared to the Rochelle facilities.²⁵⁹ It is unclear how much research actually went into the choosing of an alternative plant and to what extent the Rochelle facilities offered improvement over Dubuque. The company also argued that it suffered immensely as a result of the difficulties it had with the banks and obtaining necessary credit.²⁶⁰ The financial difficulties Dubuque Packing suffered cannot be minimized.²⁶¹ Nevertheless, it is evident from the facts that the company believed that most of its financial difficulties were the result of high labor costs.²⁶² Thus, it appears that labor costs were a relatively significant consideration compared to the other economic considerations.

Also, the union had a legitimate argument that the company violated its obligation of fair dealing by setting deadlines and breaching its promise not to seek additional concessions, especially while the relationship was governed by the agreement.²⁶³ Finally, the union had a significant interest in job security because an entire operation of the Dubuque plant would be discontinued, and a significant number of jobs would be lost. Because of the lack of fair dealing, there would thus be a possible violation of the Act. Hence, the benefits of requiring bargaining are fairly substantial.

As for the burdens, in light of the continuing press releases and repeated attempts to obtain financing as well as attempts to get the union to make concessions for over a year, speed, secrecy, and flexibility could not be issues. Also, the company was not relocating in order to continue serving a particular customer. The only substantial burden upon the company was the dire economic situation it faced for approximately five years before relocating. Again, these difficulties appear to have been primarily the result of high labor costs. Thus, when the burdens are weighed against the benefits, it would appear that the company should have been required to bargain with the union regarding its decision to relocate to Rochelle.

Such blatant statements, especially in press releases, are evidence that labor costs were the crucial, if not the motivating factor.

²⁵⁹ *Dubuque II*, 303 N.L.R.B. no. 66, 1991 WL 146795, at *14.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See *supra* note 258 and accompanying text.

²⁶³ *United Food & Commercial Workers' Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1438 (D.C. Cir. 1989).

As noted previously, the result of the application of this balancing test does not produce a per se result for all relocation decisions. Rather, the decision rests on the unique facts and circumstances of the case.

VII. CONCLUSION

Although the phrase “terms and conditions of employment” has produced a vast amount of diverse literature and case law, the approach for resolving these difficulties has been adequately set forth in *First National Maintenance*. Applying the *First National Maintenance* balancing test in a comprehensive manner involves consistently weighing the benefits of collective bargaining against the burdens that collective bargaining imposes upon management’s decisionmaking. Two overlapping factors require review when examining the benefits of collective bargaining: the nature of the relationship between labor and management and the nature of management’s decision. After scrutinizing the benefits, the burden that collective bargaining imposes upon management’s decisionmaking process must be examined. The benefits and the burdens must then be weighed against one another in light of the specific facts and circumstances surrounding the labor-management relationship. If applied consistently and comprehensively, as pointed out by this Comment, the *First National Maintenance* balancing test provides the tools for resolving not only difficult employer relocation decisions but also other Type III management decisions by leaving the bargaining in the hands of the parties as much as possible.

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